

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY

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4 KARS 4 KIDS, INC.,
5 PLAINTIFF

6

7 Vs.

CIVIL NO.
14-7770 (PGS)

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9 AMERICA CAN!,
10 DEFENDANT

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13 **JULY 24, 2019**
14 CLARKSON S. FISHER COURTHOUSE
15 402 EAST STATE STREET
16 TRENTON, NEW JERSEY 08608

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20 B E F O R E: THE HONORABLE PETER G. SHERIDAN
21 U.S. DISTRICT COURT JUDGE
22 DISTRICT OF NEW JERSEY

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27 **HEARING ON PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE ANY**
28 **OPINIONS ON DAMAGES**

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FRANCIS J. GABLE, C.C.R.
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1 THE COURT: This is Judge Sheridan.

2 (Counsel say good morning.)

3 THE COURT: So, this is Kars 4 Kids with a K versus
4 America Can! Cars with a C. We should enter appearances;
5 we'll start with the plaintiff.

6 MS. OFOSU-ANTWI: Good morning, your Honor, this is
7 Eleonore Ofosu-Antwi from Walsh, Pizzi, O'Reilly, and with me
8 is my co-counsel from Orrick whom I'll introduce themselves.

9 MR. VOGL: Good morning, your Honor, it's Peter Vogl
10 and David Litterine-Kaufman on behalf of plaintiff Kars 4 Kids
11 on the line.

12 THE COURT: Good morning Mr. Vogl and -- Mr. Kaufman
13 is it?

14 MR. VOGL: Yes, your Honor.

15 THE COURT: Okay. And for the defendants?

16 MR. KINKADE: Good morning, your Honor, Christopher
17 Kinkade, Karen Confoy and Allison Hollows from Fox Rothschild,
18 and I'll let co-counsel introduce themselves.

19 THE COURT: Good morning.

20 MR. PITTMAN: Your Honor, this is Aubrey Nick
21 Pittman for America Can! Cars For Kids.

22 MS. WILDE: And Valerie Yanaros Wilde for America
23 Can! Cars For Kids.

24 THE COURT: Good morning.

25 Anyone else?

1 All right. Mr. Vogl, I believe we're looking at
2 your application.

3 MR. VOGL: Yes, your Honor. So, your Honor, may I
4 begin?

00:01 5 THE COURT: You may.

6 MR. VOGL: Thank you, your Honor. Your Honor,
7 America Can!'s opinion on damages should be excluded in its
8 entirety and there are three reasons for that. America Can!'s
9 claims for injunctive relief and monetary relief are barred by
10 laches because of America Can!'s 12-year delay.

11 If your Honor recalls from the 2003 letter when it
12 first knew that my client, Kars 4 Kids with a K, was using the
13 mark Kars 4 Kids, until 2015 when it brought its claim for
14 infringement in this case. A finding of laches, your Honor,
15 in this case obviates the need for any remedies trial next
16 week.

17 Also, your Honor, pending before the Court is
18 plaintiff's motion in limine specifically requesting that the
19 Court exclude the 2018 expert opinions of America Can!'s
20 expert Bryce Cook, to the extent that those opinions recite a
21 damages theory that seeks Kars 4 Kids' nationwide profits.

22 We believe, your Honor, that that opinion, that is a
23 nationwide profits opinion, propounded by Mr. Cook at the
24 outset of the case, is irrelevant under 401 at this point,
25 because indeed the jury found that the only infringement in

00:03

1 this case was relegated to Texas. He in his original report
2 did not identify, carve out in any way Texas in terms of
3 revenues or profits.

4 Also before the Court, your Honor, is something that
5 happened after we spoke with your Honor last Monday. America
6 Can! has provided us for the first time with a supplemental
7 report as they call it, disclosing to us a now Texas theory of
8 damages. We believe, your Honor, in light of the lateness of
9 that report and in view of the upcoming damages trial that is
10 set for next Tuesday, that that supplemental report is
11 untimely and prejudicial under Rule 403.

12 So we would argue, your Honor, for those three
13 reasons -- and I will give your Honor a little bit more detail
14 on each; but for those three reasons, your Honor, we believe
15 that it should be clear that the opinion of Mr. Cook, and
16 frankly any opinion on damages and a proposed injunction, is
17 no longer timely, is certainly not well founded, and certainly
18 precluded by laches.

19 And to that point, your Honor, the doctrine of
20 laches as your Honor knows bars a claim where there's
21 inexcusable delay and there's prejudice. And in both
22 instances, your Honor, there is indeed inexcusable delay and
23 prejudice here.

24 Interestingly, your Honor, just turning to the
25 newest supplemental report that we got last Wednesday, you

1 know, I'll remind the Court that the verdict in this case
2 where the jury did find that my client, Kars 4 Kids with a K,
3 infringed in Texas was delivered on May 28. And, your Honor,
4 even in their opening remedies brief that the Court asked both
5 sides to provide the Court with an opening remedies brief
6 which was due on 6/28, there was no mention of a Texas only
7 theory.

8 And then there was an opposition brief that both
9 sides filed to their respective proposed remedies briefs on
10 7/12; again, no mention of a Texas theory whatsoever. And
11 indeed, even in the opposition brief as I said that they filed
12 on 7/12, no indication of a Texas brief -- Texas remedy.
13 Indeed, in fact the America Can! folks continued to hold to a
14 national theory of damages in that brief.

15 So, your Honor, we feel that the Lanham Act does not
16 specifically identify a statute of limitations. But what
17 courts have done -- particularly in New Jersey; what the
18 courts have done, your Honor, is use the New Jersey six-year
19 fraud statute as the basis to determine whether or not a
20 statute of limitations has applied in bringing your action.

21 The *Santana* case, which is 401 F.3d at 123, and
22 specifically at page 135, deals with this topic, as does
23 *Kaufhold*, K-a-u-f-h-o-l-d, v. *Caiafa*, which is C-a-i-a-f-a, at
24 872 F.Supp.2d 374, at 379, District of New Jersey case in
25 2012; the courts there have found that claims under the Lanham

1 Act are properly analyzed -- or analogized to New Jersey's
2 six-year fraud statute.

3 So, your Honor, what's happened is that, as I
4 mentioned at the outset, the 2003 letter where the America
5 Can!'s folks have written to my client and objected to our
6 client's -- my client's use of Kars 4 Kids in Texas, nothing
7 happened; nothing indeed happened between that 2003 and 2015
8 when they brought suit. They sent a letter in 2013, but even
9 that letter in 2013 did not conclude in litigation by them
10 until we sued them first. Perhaps they would have never
11 brought up this issue had we not brought this case to the --
12 brought the case in New Jersey.

13 So, the fact of the matter is they sat on their
14 hands, and in the meantime by sitting on their hands for that
15 period of time, which is 12 years, which is twice the statute
16 of limitations, my clients continued to use its mark and build
17 its national reputation, and incur between 50 and \$60 million
18 worth of advertising and marketing costs in building their
19 brand, and America Can! did nothing.

20 So, we believe that, your Honor, based on that --
21 their own actions, America Can! has inexcusably delayed in
22 bringing the suit, and indeed caused prejudice to my client.
23 And with that prejudice comes now, your Honor, because they
24 have exceeded the time within the statute of limitations to
25 bring their action, there's a presumption that applies here.

1 And that presumption really goes to a presumption of laches
2 which they now have to overcome.

3 And we believe, your Honor, that based on the facts
4 of the case that were elicited at trial, that the delay and
5 the injury or the harm that delay has caused my client, that
6 they can't overcome, America Can! can't overcome that laches
7 issue, your Honor. So, we believe that laches alone precludes
8 any testimony with respect to damages, and as a matter of fact
9 any remedies in this case pursuant to Third Circuit precedent.

10 So, your Honor, we think that laches alone resolves and
11 obviates the need for any further damages or discussion of a
12 scope of an injunction in this case.

13 If even the Court were to find that laches does not
14 apply here, we think that the report submitted by Mr. Cook
15 that speaks to a nationwide damages theory, is at this point
16 completely irrelevant to this case. It doesn't fit as the
17 courts like to say the facts in this case, because the jury as
18 we know found infringement in only one state, Texas.

19 Obviously we can't infringe in the other 49 states,
20 and in fact we are coexisting with the other side in the other
21 49 states. There is no basis to find that any damages or an
22 injunction should apply to the other 49 states. So, any
23 nationwide theory that America Can! would continue to propound
24 in this case, is inappropriate at this point in view of the
25 jury's -- the jury's verdict.

1 With respect to the supplemental report, it indeed
2 now creates and provides a new theory. And indeed that
3 theory, just to compare Mr. Cook's 2018 report, that is the
4 report that he put in at the outset of the case, estimates
5 nationwide revenue and nationwide profits. There is
6 absolutely no discussion of revenue or profits from any
7 individual state anywhere in that report. In fact, Mr. Cook's
8 new opinions about Texas revenues and Texas profits in his
9 supplemental report, or -- don't appear anywhere in the 2018
10 report.

11 And it's not just a matter of dividing nationwide
12 revenues and profits by 50, it isn't that simple, nor does
13 frankly Mr. Cook say it's that simple. Indeed what he does is
14 he uses -- you know, the documents that Mr. Cook uses for the
15 Kars 4 Kids revenue give aggregate nationwide revenue. They
16 don't break it down by state. So Mr. Cook needed to come up
17 with a methodology in his new report --

18 THE COURT: I understand that, Mr. Vogl.

19 MR. VOGL: Okay.

20 THE COURT: I have a couple questions.

21 MR. VOGL: Please.

22 THE COURT: First, when we were going through
23 damages at the trial, it was actually before the trial began,
24 and it may have been a week or two before, but we decided that
25 we would put damages off to this new proceeding that we're

1 having next week.

2 MR. VOGL: Yes.

3 THE COURT: One of the reasons if I recall this
4 right, and I haven't checked the transcript, but it was my
5 thought, and I believe it was your argument that what Mr.
6 Pittman was seeking for Cars with a C was disgorgement.

7 MR. VOGL: Right.

8 THE COURT: And we thought that was an equitable
9 remedy. And he had produced in Cook's report the income
10 generated nationally I suppose at that time by Kars 4 Kids
11 with a K.

12 MR. VOGL: Yes.

13 THE COURT: But he never produced, if I have this
14 correct in my mind, what the expenses were with regard to
15 same. So, his report was just based on income, which seemed
16 to be really extraordinarily overbroad I suppose for lack of a
17 better word, or excessive, and it needed to be subject to
18 whatever the expenses were.

19 MR. VOGL: Right.

20 THE COURT: And I thought you had indicated at that
21 time what we really need to do for a remedy is maybe do some
22 type of an accounting. And that's why you asked me if that's
23 an equitable remedy, maybe that's what we should be doing is
24 an accounting; right?

25 Is that still your position?

1 MR. VOGL: Yes. So your Honor, you're absolutely
2 correct. This is Peter Vogl, your Honor. Yes, disgorgement
3 is an equitable remedy, and that is the basis for our request
4 that the disgorgement portion was not an issue to be decided
5 by the jury, but by your Honor. So your Honor's memory on
6 that is absolutely correct, that disgorgement is indeed an
7 equitable remedy and that is the indeed reason why we're now
8 talking after the jury has rendered its verdict as to what if
9 any remedies should apply here in terms of disgorgement.

10 THE COURT: So how do we go about doing an
11 accounting?

12 MR. VOGL: Well, your Honor, what the other side has
13 done here -- and again, I say the 990s -- if your Honor
14 recalls that phrase, the 990s are the tax returns if you will
15 for charitable organizations.

16 THE COURT: I got it.

17 MR. VOGL: And what the other side has done is
18 they've taken a look at those 990s and added up the revenues
19 based on those 990s and come to a dollar number. Those 990s,
20 however, don't break down the revenues by state. So, those
21 990s that Mr. Cook used speak to a nationwide revenues, not to
22 state-by-state revenues.

23 So, the theory that he used in the original report
24 was again a nationwide theory, so the 990s did form at least
25 some benchmark if you will for us to then discuss as to what

1 the appropriate costs should be and deducted from the overall
2 revenues, gleaned through the national revenues.

3 THE COURT: So can I do that by appointing an
4 accounting firm?

00:15 5 MR. PITTMAN: Your Honor, this is Mr. Pitman --

6 THE COURT: I'm talking to Mr. Vogl right now.

7 MR. PITTMAN: I apologize. I apologize.

8 THE COURT: Mr. Vogl, can I appoint an accounting
9 firm to look at what the income was and what the expenses were
10 in Texas?

11 MR. VOGL: Well -- so the answer is, your Honor, I
12 think both sides have done just that, I think both sides have
13 appointed -- you know, we have obviously a rebuttal witness,
14 Mr. Hall, who has submitted a report in this case. So I think
15 that both sides have submitted, you know, expert reports. I
16 mean certainly your Honor -- if your Honor wanted to pick his
17 own independent --

18 THE COURT: I don't think Mr. Cook has submitted an
19 accounting of revenues in Texas. I thought his numbers were
20 based on estimates that he had --

21 MR. VOGL: Correct.

22 THE COURT: So I don't think that's -- I'm having
23 trouble accepting the estimates.

24 MR. VOGL: No, I agree with your Honor, and in fact
25 we haven't even been able to test the theory that he's put

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1 forward in his supplemental report. I won't bore you with the
2 details, but our expert has been unavailable to us so we
3 haven't even had a chance to sit down with him yet. But the
4 point is that certainly there have been assumptions that Mr.
5 Cook makes and methodologies that he is proposing that we
6 certainly would want to take on in any -- any discussion with
7 respect to what's the appropriate, if any, damages in Texas.
8 Because again, being that we're now just talking about Texas,
9 none of that's been done yet.

10 THE COURT: Why can't we have somebody just look at
11 -- you have all the records together; right? So why can't we
12 just have an accountant look at the records, determine what
13 income came from Texas, and then look at the expenditures and
14 see which expenditures related to Texas, and, you know,
15 subtract that out, then we come up with a number.

16 Why can't that happen? Why do I need estimates? It
17 seems to me it's straightforward, unless I'm -- you know, I'm
18 not an accountant, I don't know exactly if all the records are
19 accurate and stuff like that.

20 MR. VOGL: So your Honor, that could work. I guess
21 the only thing I would propose to your Honor though is that
22 the idea of whether they're even entitled -- you know, whether
23 the equity would allow them, again, this should not be a
24 penalty, it's got to be somewhat reasoned in terms --

25 THE COURT: You can argue that all you want. I just

1 want to know about a remedy first, and then I'll get into your
2 legal arguments.

3 MR. VOGL: Sure.

4 THE COURT: Because your legal argument also impacts
5 what I'm going to do on laches. When I'm reading it, it seems
6 to be a hypothetical question to me. I don't have any -- what
7 am I barring exactly, and what am I allowing in exactly, I
8 don't know.

9 But if I had an accountant go back from 2000 or 2003
10 and tell me what the expenses were each year, what the income
11 was each year, then we can see the impact of the laches and
12 make a decision on it. It would be helpful in determining
13 this.

14 MR. VOGL: The only thing I would suggest, your
15 Honor, is that I don't know if we have a granular -- that
16 level of granularity in terms of what actually was, you know,
17 distributed -- or excuse me, what was donated from Texas
18 specifically. So I'm a little bit -- I guess I would want to
19 confirm, your Honor, that that evidence is in the record. I'm
20 not sure that it is at that level of detail that would allow
21 an accountant --

22 THE COURT: Mr. Vogl, I don't think it needs to be
23 in the record at the present time. If your client has the
24 information, then we can make that available for the expert to
25 look at it. Even if it hasn't been --

1 MR. VOGL: Understood.

2 THE COURT: You know what I mean, as long as they
3 know it's there.

4 MR. VOGL: Yeah. And I think the answer is it
5 likely is there, your Honor. I just don't know sitting here
6 -- I can't you know represent to your Honor with full hundred
7 percent certainty that it exists in that -- in that way, but I
8 would imagine it should or would. So I think to your Honor's
9 point, if your Honor wants that level of detail, you know, I
10 would -- obviously I'll inquire immediately.

11 THE COURT: All right. Do you have any other
12 arguments before I hear from your adversary?

13 MR. VOGL: Well, your Honor, I think I -- I guess I
14 would just reiterate that I think that the case law in the
15 Third Circuit does indeed provide the Court with sufficient
16 basis to find laches here. And I do think that, you know, the
17 report for the 328 million that they sought in the national
18 theory that they put forward originally should be stricken.

19 And if we're going to get down to just discussing
20 what in Texas is in the way of damages, obviously we feel that
21 no damages apply here at all, your Honor, but we can
22 certainly -- and I will, your Honor, seek that additional
23 information from the client so that we can -- we can move
24 forward.

25 THE COURT: All right. Well, I haven't made a

1 decision on that yet, I was just --

2 MR. VOGL: Sure.

3 THE COURT: -- trying to test out some
4 methodologies.

00:21 5 MR. VOGL: I guess, your Honor -- and I don't want
6 to throw a monkey wrench into this, but if we were going to do
7 it that way I would submit to your Honor one thing -- a couple
8 things. You know, we'll need to take Mr. Cook's deposition if
9 his supplemental report stands and is going to be proposed in
00:21 10 this case and the Court's going to allow that to take place,
11 we're going to want to take his deposition on that report.

12 We'll also want to put in our own report, so that
13 the Court has the benefit of not only Mr. Cook's report on
14 Texas but our own report. And then that will have some impact
00:22 15 frankly, your Honor, in our -- in our ability to be prepared
16 for next Tuesday, which I think is coming up very quickly and
17 won't be able to get all this done by then.

18 So, I guess I would just throw out, your Honor, that
19 if we're going to have an independent accountant look at this
00:22 20 information and/or even if we are not and we're just going to
21 proceed with us dealing with Mr. Cook's supplemental report, I
22 would ask your Honor to -- we're going to need to adjourn
23 Tuesday and move it to another date. But I throw that out
24 there as a proposal, your Honor.

00:22 25 THE COURT: Okay, thank you.

1 MR. VOGL: Sure, thank you.

2 THE COURT: Mr. Pittman?

3 MR. PITTMAN: Yes, your Honor. Your Honor, and of
4 course I'd certainly be happy to address the laches argument,
5 I think it's completely inapplicable here. Mr. Vogl will
6 acknowledge that they brought a claim in 2014 allegedly for
7 acts that happened in 2003. So if he were correct that laches
8 applied, then they are guilty of pursuing a lawsuit that they
9 knew they were -- that was untimely from the start, because it
10 was the same act.

11 So clearly that has never been the case. Laches has
12 never applied to either party's claims in this case. Again,
13 he wouldn't have been able to bring his lawsuit --

14 THE COURT: So Mr. Pittman, I was a little confused
15 in your brief. Are you arguing that the damages should go
16 back to 3/28/2013, when Cars with a C advertised in Houston,
17 or 2011 when you found out Kars with a was using your domain
18 name; or how far are you going back on your damages?

19 MR. PITTMAN: To 2008, your Honor.

20 THE COURT: To 2008. How did you reach 2008?

21 MR. PITTMAN: Which would have been the time that --
22 there's a six-year period, we would be allowed to recover
23 damages within the six-year period of the act that we were
24 alleging. And that was the 2000 -- we sent that 2013 cease
25 and desist letter, so it would be six years prior to that. So

1 roughly the end of 2007 would be the time.

2 So Mr. Cook calculated damages from 2008, and so
3 that's would be the period, your Honor. But absolutely there
4 was some infringement and these are distinct acts of
5 infringement. Some was more narrow just in one city. The
6 first in 2003 that Mr. Vogl is referring to was one act in
7 2003 that stopped, that act stopped. So there was no cause of
8 action once that action stopped in 2003.

9 There's no evidence showing that in 2004, for
10 instance, they advertised in Dallas. It's just not there. So
11 that act stopped. So it wasn't until much later in the 2011
12 or so timeframe that Cars with a C became aware of this. So
13 again, clearly laches doesn't apply. I'm not sure why Mr.
14 Vogl is assuming that it does, your Honor --

15 THE COURT: Well, the next time you knew there was
16 damages in Texas was 2011; is that what you're saying? Why
17 would I go back beyond that if there's no proof of damages.

18 MR. PITTMAN: Your Honor, there is proof. So the
19 way it works is is we would be -- if we find out today, then
20 there's a six-year statute of limitations. So you'd capture
21 any infringement that happens within six years of the time of
22 the lawsuit, when you file the lawsuit. You can going back
23 six years, because that's the statute of limitations for it.

24 So if you find that an act happened -- for
25 instance, if I file a lawsuit today in 2019, I could file the

1 lawsuit with respect to any act that --

2 THE COURT: Don't go to today, Mr. Pittman, I don't
3 want any hypotheticals.

4 MR. PITTMAN: Yes, your Honor.

00:26 5 THE COURT: Tell me about --

6 MR. PITTMAN: I apologize.

7 THE COURT: Go into the case.

8 MR. PITTMAN: Right. In 2014 when the lawsuit was
9 filed, the counterclaim was filed, that allowed America Can!

00:26 10 to include or receive damages for any infringement that
11 occurred within six years of that time period. So that's why
12 Mr. Cook went back to 2008. So it would be 2008 forward.

13 THE COURT: But you said the next time you heard
14 about Kars 4 Kids was when you saw that they advertised in
00:27 15 Houston, which was 3/28/13. So why isn't that the last -- if
16 we're only dealing with Texas and that's the next time they
17 advertised there, why would we go beyond that?

18 MR. PITTMAN: Well, your Honor, the reason why we
19 did -- and again, it's all -- as the Court knows it's an
00:27 20 equitable remedy, so the Court can look at the facts and the
21 Court can pick some other point. But for purposes of the
22 legal argument, the legal argument is that if there was some
23 infringement -- so, take the 2013 letter when we found out
24 about it, when we found out about that act in Houston; that
00:27 25 caused America Can! to do further investigation, and they

1 found out that there had been previous infringement.

2 And as Mr. Vogl pointed out in his opening and
3 closing argument, they were doing some -- Kars with a K, they
4 were using our right in 2007 and 2008 and 2009 in Chicago and
5 in New Jersey. So that allowed --

6 THE COURT: You're not entitled to damages, as best
7 as I can tell, unless you have another argument for this that
8 I haven't considered, except for in Texas. So when you say
9 they were using your rights in Chicago, that doesn't help me
10 with your damages as far as I see it.

11 MR. PITTMAN: Well, your Honor, that gave us notice.
12 So that's -- that's the one thing -- I was speaking of the
13 notice which allows us to go back. So if the Court limits the
14 damages to Texas, which, you know, we're prepared to
15 demonstrate to the Court why that shouldn't be true, but if
16 the Court were to do that then it would still be that we would
17 be entitled to the infringement in Texas.

18 So to the extent we are able to show infringement in
19 Texas six years prior to that time, we still get those back
20 damages for Texas for 2008 through the time of trial.

21 But your Honor, you know, again, our position is
22 that if you look at it -- in this case, and there are a couple
23 of things that Kars with a K that they -- they're omitting
24 from their argument. And that is that the jury decided -- and
25 as the Court knows, Kars with a K started out with a national

1 registration, a federal registration, which gave them a
2 presumption that they owned nationwide rights.

3 The jury said they did not own that. They did not
4 own any nationwide rights whatsoever. Any infringement, your
5 Honor, is fruit of the poisonous tree. When they started in
6 Texas in 2003, the infringement that they started doing was
7 infringing America Can!'s rights.

8 But now Kars with a K is asking the Court to give
9 them nationally 49 states that the jury didn't find for them.

10 They had a presumption under the law, a federal registration
11 gives a presumption that you own rights nationally. The jury
12 rejected that and said that Kars with a K did not own any
13 rights nationally; but Kars with a K is asking the Court to
14 allow them to keep that fruit of the poisonous tree, to allow
15 them to keep it.

16 This was not a wash, your Honor. The jury -- again,
17 they started off with -- we had common law rights, so we
18 didn't have a presumption of national rights. Kars with a K
19 had a presumption of national rights. The jury rejected that
20 and said they didn't have any national right. But what Kars
21 with a K is asking the Court to do now, is to give them those
22 national rights, allow them to keep that national revenue that
23 the jury said they were not entitled to because they did not
24 prove that their national registration that they had obtained
25 from the USPTO, the jury said they did not have that right.

1 And so -- and again, as your Honor knows, this is an
2 equitable claim, so we're prepared to argue to the Court from
3 the actual facts of the record. And that's what -- in there's
4 two cases that they've cited, the *Natural Footwear* case and
5 the *Coverttech* case, both say the same thing, your Honor. It
6 says that the court has to look at whether a -- the party's
7 rights were infringed are entitled to damages outside of a
8 certain geographical area.

9 There are specific facts that the Court has to look
10 at. In the *Natural Footwear* case that Kars with a K is citing
11 to, it doesn't say what they're saying it says. It doesn't
12 say that a court can't give -- can't find nationwide
13 infringement and give that even though there was infringement
14 found in one state. In that case, the facts -- and again,
15 these are all fact specific cases.

16 In the *Natural Footwear* case the court found that
17 the winner made no serious effort to do business beyond New
18 Jersey. That's not the case here.

19 THE COURT: But Mr. Pittman, you can talk to me all
20 day; I read that in the briefs, I just don't -- I'm not
21 accepting that.

22 MR. PITTMAN: Right. And your Honor --

23 THE COURT: If you want damages, I think you're
24 entitled to them under the jury verdict for Texas, and Texas
25 alone.

1 MR. PITTMAN: Right. Right.

2 THE COURT: I think I'll just limit it to Texas.

3 MR. PITTMAN: Right. And that's certainly -- your
4 Honor, again, in equity that's completely proper and
00:32 5 appropriate if the Court decides that. So we're not arguing
6 that part, we're just -- we're letting to Court know that the
7 law doesn't say that, but in equity the Court can do -- you
8 know, can do what it wants to do, what it thinks is
9 appropriate.

00:33 10 Now, turning to the actual accounting and the
11 expenses, Mr. Vogl is incorrect when he said to the Court that
12 Mr. Cook did not take that into account. Mr. Cook did take
13 expenses into account, your Honor. We've said that multiple
14 times, I'm not sure why Mr. Vogl keeps saying he didn't, he
00:33 15 did.

16 And here's the issue, your Honor, and I don't
17 think -- certainly the Court has the right to appoint an
18 expert, accounting expert, to assist the Court, and if the
19 Court were to do that we certainly wouldn't object to it.

00:33 20 However, if you look at the reports, if you look at the report
21 of Mr. Cook and Mr. Hall, you will see, your Honor, that
22 there's no disagreement in terms of the actual revenue.
23 There's no disagreement.

24 There's no disagreement in terms of the expenses.

00:33 25 Mr. Hall applied expenses, Mr. Cook applied expenses. The

1 disagreement is the type of expenses that should be -- not the
2 amounts, but the type of expenses, the categories of expenses.
3 Mr. Hall is arguing that certain categories of expenses should
4 be deducted, and Mr. Cook is saying those categories. Again,
00:34 5 not amounts, but the categories. They don't disagree as to
6 the amount. That is up until 2016.

7 What Mr. Cook did is for the Texas specific, and Mr.
8 Cook did that to assist the Court if the Court were to decide
9 in its discretion to limit it to Texas. That's what Mr. Cook
00:34 10 -- Mr. Cook didn't have any other reason to do that. Your
11 Honor, we tried to perform a service to the Court if the Court
12 decided to limit it. Again, our argument is not that it
13 should be limited, but again to assist the Court, Mr. Cook
14 provided that.

00:34 15 Now, what Mr. Vogl fails to tell the Court is that
16 Mr. Cook and Mr. Hall both relied on actual revenues. So
17 again, it's not, you know, projected revenues at least up
18 until 2016. So there are actual revenues in the record from
19 the 990s from K4K.

00:35 20 So their revenues, your Honor -- through their
21 revenues they produce what is effectively a
22 revenue-per-vehicle number. So they took the total revenues,
23 again, both of them used the same revenues, and Mr. Cook was
24 able to determine, just as Mr. Hall will be able to, he took
00:35 25 the total revenue, divided by the total number of cars and he

1 got a revenue-per-vehicle number.

2 Then Mr. Cook applied that to the actual vehicles
3 that were obtained in Texas by K4K. These are from K4K's
4 records, your Honor, these are not numbers that Mr. Cook made
5 up or America Can! these are actual numbers, Mr. Cook used
6 actual numbers.

7 And now Mr. Cook, because he didn't have the last
8 couple of years from K4K, because again, it's their burden,
9 they've got to produce the records, they've got to produce the
10 expenses; he did not have their records which K4K could easily
11 give Mr. Cook their records. So based on previous years Mr.
12 Cook just made a projection for the last two years, since his
13 report was filed.

14 But we're talking, your Honor, about actual
15 revenues. So this is not hypothetical revenues, Mr. Cook
16 didn't come up with any hypothetical revenues, these are
17 actual revenues that we can show the Court on paper. So that
18 whether it's the Court or whether it's an independent
19 accountant, we'd be able to show the Court the actual revenues
20 that K4K received; be able to show the actual expenses that
21 K4L in incurred in producing that revenue.

22 So it's just a matter for this Court or the
23 accountant saying whether these -- I think there are two
24 categories of expenses that Mr. Cook says shouldn't be
25 deducted, Mr. Hall should be deducted.

1 So your Honor, I thought during the course of the
2 trial Mr. Vogl had argued that the accounting should be done,
3 and at that time the Court can hear from the experts. And so
4 I think we're at that point where the Court can hear from
5 these two experts; Mr. Hall will say why these certain
6 categories of expenses should be deducted, and Mr. Cook will
7 say why they shouldn't be deducted, and the Court can make a
8 decision either to deduct them or not.

9 It's not really an accounting exercise that the
10 Court would have to undertake, it's just a matter of whether
11 the Court thinks that, you know, these program expenses should
12 be deducted or not. And we can put on evidence from our fact
13 witness as to what those expenses consist of, and then the
14 Court can make a determination as the Court does every day
15 whether this is -- whether it looks appropriate to deduct, you
16 know, warehouse expense for instance, in determining the net
17 revenue or not.

18 So it's not going to be a complicated process, I'm
19 not sure why Mr. Vogl is making it more complicated, but it's
20 the actual K4K revenues that we're looking at. And then Mr.
21 Cook, again, as it relates to Texas, he didn't change
22 methodology. The original calculations would have allowed
23 both experts to come up with a revenue-per-week vehicle
24 number. It's just a matter of taking a total revenue,
25 dividing it by the total number of donations. That's all it's

1 a simple mathematical calculation that's done.

2 The only thing that Mr. Cook did that made it
3 different with the latest report that he produced, is for the
4 last two years I believe he had to do projections based on --
5 but those projections were based on historical information
6 from K4K. Again, he didn't base it on America Can!'s
7 information, he based it K4K's information that they provided
8 to us during discovery.

9 THE COURT: Okay. Mr. Vogl, any rebuttal?

10 MR. VOGL: Yes, your Honor. So what Mr. Pittman is
11 describing is in the nationwide study that was done
12 originally. This methodology and revenue by vehicle, all this
13 detail as to Texas is nowhere to be found anywhere or nor
14 could it be found in the original report. So, you know, to
15 somehow suggest that this is all simple is not the case,
16 because now we're just talking about Texas.

17 And none of this Texas theory that Mr. Cook is
18 putting forth has been subject to any cross-examination. And
19 frankly, your Honor, there is cross-examination and, you know,
20 advice of our expert that's going to be needed before we get
21 to that point. So the simplicity at which Mr. Pittman
22 describes this is absolutely not the case. There's some work
23 ahead of us before we get to that point.

24 So frankly, your Honor, I think that -- you know,
25 the methodologies used by Mr. Cook in the Texas report, his

1 projections used in that report, you know, all of that detail
2 needs to be -- needs to be vetted. And, you know, so far
3 since we just got this report last Wednesday, we haven't had
4 an opportunity to do so that.

00:40

5 So my hands are a little bit tied in terms of
6 commenting in any greater detail, but that certainly is ahead
7 of us, your Honor.

8 THE COURT: All right.

9 MR. PITTMAN: Again, your Honor, the -- I apologize.

00:40

10 THE COURT: Go ahead, Mr. Pittman.

11 MR. PITTMAN: The Texas donations, your Honor, are
12 in the record, these are their records; it's always been
13 there. We've got donations from every state, each of the 50
14 states. So I'm not sure what Mr. Vogl is saying is not there;
15 it's there. It's always been there. Mr. Hall looked at it,
16 their expert looked at it, our expert looked at it. They
17 didn't break it out, but it's there clearly in the record. It
18 takes three seconds to find the Texas donations for each year.

00:40

19 So I'm not sure --

00:40

20 THE COURT: Well, if you have the donations I can
21 probably see that; but how about what expenses they had with
22 regard to each donation, is that set forth in the records that
23 you have, Mr. Pittman?

24 MR. PITTMAN: Correct, your Honor.

00:41

25 THE COURT: It is?

1 MR. PITTMAN: Yes, your Honor.

2 THE COURT: Why didn't you estimate the revenues per
3 vehicle when you just do the actual calculation?

4 MR. PITTMAN: It is -- the calculation does show
5 revenue per vehicle.

6 THE COURT: I thought you said that the estimated --
7 you took the total number of cars, divided it into the total
8 revenue and then came up with what received per vehicle. Why
9 didn't you just --

10 MR. PITTMAN: Yes, your Honor.

11 THE COURT: -- get the Texas cars, find out the
12 actual expenses, then you can find out what the revenue was
13 per vehicle in Texas.

14 MR. PITTMAN: Absolutely, your Honor, and that's
15 exactly what Mr. Cook did. Again, the methodology didn't
16 change. Mr. Cook originally back in 2017 and 2018, he
17 determined the actual revenues, based on Kars 4 K's records.
18 He determined the actual number of donations based on K4K's
19 records. So again, all you have to do is divide it into it.

20 So what Mr. Cook has done now, again, to assist the
21 Court if the Court decided to just limit it to Texas, Mr. Cook
22 took again the actual donations from Texas, only from Texas,
23 and he multiplied that by the revenue per vehicle, which is
24 what was always decipherable from his original report.

25 Again, it's not -- it's not rocket science, your

1 Honor, Mr. -- and it's the same with the expenses. You take
2 the expenses, you take the total expenses, divide those by the
3 number of vehicles and you get the expenses per vehicle. And
4 so if you do that for Texas, your Honor -- and again, it took
5 Mr. Cook 10 minutes to do that. It would take Mr. Hall --
6 because Mr. Hall already has the information.

7 So I'm not sure why Mr. Vogl again is suggesting
8 that it's rocket science by his expert, his expert has been
9 doing this for over 20 years. He can certainly take the total
10 revenue, divide it by the number of vehicles that K4K reported
11 to us. They reported that to us, it's not something we got
12 from a third-party source. That's what they provided, K4K
13 provided to our expert to look at.

14 So their expert could take the same actual revenues,
15 divide it by the number of vehicles, and again just for Texas,
16 and come up with that. So he can take the actual revenues,
17 the national revenues, divide it by per vehicle and gives a
18 revenue per vehicle. And you look at the number of vehicles
19 that were obtained in Texas, again, from their records, and
20 multiply that times the revenue per vehicle and you get it.
21 So it's very simple, your Honor.

22 THE COURT: Here's what I think what we should do
23 for next week; I would ask that Mr. Cook and -- I forget Mr.
24 Vogl's

25 MR. VOGL: Hall.

1 MR. PITTMAN: Hall, your Honor.

2 THE COURT: Hall; if he can -- what I think I need
3 to know is as close as reasonably practicable, the damages
4 that are -- or I guess the revenues of Kars 4 Kids with a K,
5 in Texas. And I'll start with your year, Mr. Pittman, 2008;
6 I'm not sure I'll accept that date, but we'll do the
7 calculation from 2008. It should be reduced by expenses of
8 Kars 4 Kids, and then I believe that gives us -- that should
9 get us to net profits.

10 MR. PITTMAN: Correct.

11 THE COURT: But I'd like to see each party's
12 calculation of that, you know, like on a piece of paper; this
13 is what we would do in order to find it for Texas; and just
14 come out with a theory on it. And if we could just do that in
15 that sense, then I believe -- we won't be able to meet next
16 week, but we should be able to then determine whether we can
17 use the two experts, or whether I need to appoint a
18 third-party to do this calculation and the accounting on it,
19 by just evaluating that and listening to you folks.

20 MR. PITTMAN: Right. And your Honor --

21 THE COURT: Does that make any sense?

22 MR. VOGL: Sure, your Honor --

23 MR. PITTMAN: Yes, your Honor --

24 THE COURT: One person at a time. Mr. Pittman
25 first.

1 MR. PITTMAN: Yes. Your Honor, Mr. Cook has already
2 done that, that's a report that he provided to Mr. Vogl last
3 week, so we can certainly have it --

4 THE COURT: I don't think that's close enough to the
5 truth, to tell you the truth, Mr. Pittman. He needs to go
6 back in -- I need to know -- you don't have numbers for the
7 last three years or something of that nature, so you projected
8 the number out. I'm not awarding damages based on
9 projections, period. It's got to be closer than that.

10 MR. PITTMAN: Right, right.

11 THE COURT: I can understand how Mr. Cook may have
12 relied on projections, but I'm not, in any damages that I
13 award.

14 MR. PITTMAN: Right.

15 THE COURT: So his report is insufficient.

16 MR. PITTMAN: Okay. So your Honor, what we would
17 have to do, we being America Can! Cars For Kids, in order for
18 us to do that for the last couple years, we would have to have
19 -- and I'm assuming the Court is going to order K4K to produce
20 that information to us so we can come apply with the Court's
21 order that we both provide --

22 THE COURT: That's exactly my point, Mr. Pittman.
23 By next week I need to know what Mr. Cook -- how he would do
24 the exact calculation on disgorgement, which I take it gets us
25 to net profits; what numbers does he need; how he would do the

1 calculation; and then if I was going to order Kars 4 Kids to
2 produce numbers, I'll do it based on what the expert tells me
3 next week.

4 MR. PITTMAN: Okay, perfect, your Honor.

00:48

5 THE COURT: And the same goes in response, if Mr.
6 Hall has a different methodology to come up with what the net
7 profits are or he thinks more expenses should be deducted -- I
8 don't know that exact issue, but I know there's a disagreement
9 on that; then I need to know that too.

00:48

10 MR. VOGL: Sure, sure. This is Peter Vogl; yes,
11 your Honor, we will provide your Honor with that information
12 as well.

00:49

13 THE COURT: And then wherever it is after we come up
14 with how we're going to -- if both of them want to come next
15 week I'd be glad to listen to them on it; or if you think
16 that's impossible then I'll set up a new date; or if we get a
17 letter and we can agree then I'd do that.

00:49

18 MR. VOGL: So your Honor, if I may, this is Peter
19 Vogl; that is not going to work for us, only because we
20 obviously need to get Mr. -- first of all, Mr. Hall's out of
21 the country and he's back tomorrow, and so we're going to get
22 him rolling on this immediately. So the timing is a little
23 bit tight for us, that's why.

00:49

24 THE COURT: Well, I'm more interested in getting a
25 process down how we're going to move forward.

1 MR. VOGL: Sure, sure.

2 THE COURT: So what I think we need to do -- I do
3 believe that disgorgement is the appropriate remedy, and I
4 think that gets us to net profits. I've been doing this at a
5 very high helpful; income less expenses, equals net profits.
6 I don't know if that's good or bad. So we need both experts
7 to tell us how we go about doing this calculation. I don't
8 want it to be based on projected numbers or estimates of
9 numbers, I want it to be as precise as we can with regard to
10 Texas.

11 MR. VOGL: Understood, your Honor. I guess last --
12 this is Peter Vogl. The last thing I would ask your Honor is,
13 we obviously believe, your Honor, that laches would preclude
14 all of this. So we would ask that if your Honor could give us
15 an order, give us a decision on the laches issue obviously at
16 some point, we will obviously accept whatever your Honor puts
17 forward but --

18 THE COURT: Here's what I'm doing on laches; I'm not
19 going to render any decision on laches until I see the numbers
20 for each year. Because --

21 MR. VOGL: Okay.

22 THE COURT: -- I want to know what I'm dealing with.
23 I don't think I should just do it on a hypothetical issue.

24 MR. VOGL: Got it. Okay, good. I just wanted to
25 make sure it was still out there, your Honor.

1 THE COURT: When I see the expenses from each year,
2 and I see what advertising was run in Texas each year, things
3 of that nature, then I'll make a decision on laches.

4 MR. VOGL: Okay. All right. I appreciate that.

00:51 5 Thank you, your Honor.

6 THE COURT: Any other issues?

7 MR. VOGL: Not from plaintiff.

8 THE COURT: So how do you want to do this, Mr. Pittman?
9 Mr. Vogl says he can't be prepared by next week.

00:51 10 MR. PITTMAN: Prepared in the sense of prepared to
11 give us the information that we need to prepare our report for
12 the last two or three years without projections? I'm not sure
13 what he's not prepared to do.

00:52 14 THE COURT: Mr. Hall is not around, he's out of the
15 country, he doesn't know about the issue. To get an expert
16 together and figure out what he's -- how he can help you, what
17 he has to write on a piece of paper with regard to how we
18 calculate this number, I don't know, it doesn't look like
19 something you can accomplish in a week from my experience.

00:52 20 MR. PITTMAN: If Mr. Vogl -- and your Honor, I guess
21 I was looking for it, some feel for whether Mr. Vogl --
22 because our expert, if he's provided with that information he
23 can do it in an hour. So I was trying to find out when Mr.
24 Vogl would be able to give it -- give us the missing
00:52 25 information that our expert's going to need.

1 THE COURT: Well, he first has to know what your
2 expert needs. So you have to talk to your expert, Mr. Cook,
3 find out what information he needs to come up with a -- I
4 would say a reasonable practical number on the net profits in
5 Texas since January 2008.

6 MR. VOGL: So your Honor, one point -- and again, I
7 didn't raise previously, is that the Jewish -- there are
8 Jewish holidays August 2nd through the 12th. So I will
9 obviously reach out to my folks now today to avoid that being
10 a conflict, but just to sort of present that to your Honor
11 that I will have some limitation in accessing my client
12 through that period.

13 THE COURT: Okay.

14 MR. VOGL: So that's something that I'm obviously
15 not expecting the supplemental report, both my expert and the
16 client, you know, are just standing by waiting for it to come
17 in. So I will -- obviously as your Honor knows I will move as
18 quickly as possible, but I can't promise your Honor that I
19 will have, even when I get Mr. Pittman's --

20 THE COURT: I'm not opposed to anyone not working
21 during religious holidays. So whatever time they need, they
22 can do it.

23 MR. PITTMAN: Same here, your Honor.

24 MR. VOGL: So your Honor, I guess just to pick a
25 date, if we could submit our report for Mr. Hall sometime --

1 I'm going to say, I'm just looking at my calendar here, August
2 30th, your Honor?

3 THE COURT: Mr. Pittman?

4 Is this your religious holiday as well, Mr. Vogl
5 or --

6 MR. VOGL: No, it's not.

7 THE COURT: Are you going to work during August?

8 MR. VOGL: Yes, yes, your Honor.

9 THE COURT: Here's what I think we need, the more

10 we're going through this; if I could just -- I suppose in my
11 mind I had the idea that if I was going to ask for
12 recommendations and appoint an accountant, and then have the
13 accountant tell me what the formula is; and then have the
14 accountant be given access to Kars 4 Kids' records to see the
15 different things they would need to figure out this
16 calculation, and that was going to be easy for me.

17 But since we're looking at using the two experts
18 rather than the accountant, I really need to know what formula
19 each expert would be using; and then would need to know what
20 information each expert would need from the other side, from
21 each party; and then I would issue an order.

22 You know, I could say we'll use this formula; this
23 information is needed, and I could require the parties to
24 produce it, whoever has it; and then I could I guess order the
25 depositions of the experts if the numbers differ.

1 MR. VOGL: Right.

2 THE COURT: But right now I don't know what to write
3 easily enough -- what I would like if we could before the
4 30th, is what is the number -- what is the formula that we
5 should use, and what information does each party need to come
6 up with the best practicable net profits figure from 2008
7 forward.

8 MR. VOGL: So your Honor, this is Peter Vogl; I can
9 say this, your Honor, that if the 30th is too long then we
10 could -- the 9th of August I think I can get your Honor the
11 information that -- the calculation that your Honor's looking
12 for, I think we can do it then.

13 I mean obviously having not had the opportunity to
14 really talk to the expert, I'm representing his availability
15 and his ability to do this, but the 9th seems like a
16 reasonable period of time for him to digest the information
17 and provide the information your Honor is asking for.

18 THE COURT: All right. If I could get those two
19 letters by the 9th, then maybe at that point I can craft a
20 better order.

21 MR. PITTMAN: Well, your Honor, it sounds like we
22 may be talking about different things. So Mr. Vogl seems to
23 be talking about the actual calculation, the actual end
24 product. What I was talking about is the information that our
25 expert's going to need to be able to give the Court that end

1 product.

2 So we can get the Court something by noon tomorrow
3 what records our expert is going to need from K4K, so that he
4 can give the Court that end product which would be the
5 calculations based on actual records, your Honor.

6 THE COURT: Okay.

7 MR. VOGL: Yeah, we -- again, your Honor, having not
8 had a chance to speak to our expert, I'm not talking about a
9 final report on the 9th, I'm talking about the information
10 that your Honor is asking us -- you know, the calculation and
11 what the deductions should be. That I can get your Honor on
12 the 9th, it's not --

13 THE COURT: It would just be a broad general
14 document, you know.

15 MR. VOGL: Yes, your Honor. That we can do by the
16 9th.

17 THE COURT: All right. I think we should follow --
18 go ahead, Mr. Pittman.

19 MR. PITTMAN: I don't know that K4K is going to need
20 any information from America Can! But to the extent they're
21 relying -- but to the extent they do, your Honor, you know,
22 we're prepared to give them whatever information they think
23 they need to be able to come up with that end product.

24 THE COURT: All right. So here's what we're doing,
25 if we've made any decision, the calculation will begin on

1 January 1st, 2008. And I'd like the numbers when they're
2 preparing them year by year.

3 MR. PITTMAN: Correct.

4 THE COURT: And then I'd just to like to know the
5 formula that they're going to utilize; and the more precise
6 that formula is the better, because I'm pretty sure there's a
7 dispute on what expenditures can be deducted. So I have to
8 know, you know, the category of expenses that can be deducted,
9 and the category of those that you disagree on.

10 MR. PITTMAN: Correct.

11 THE COURT: And then --

12 MR. VOGL: Understood.

13 THE COURT: So that's just generally. But this only
14 applies to Texas, you know, it's not broader than that. I
15 don't see how we can use Mr. Cook's original report. It seems
16 to apply to all 50 states. I think we need to get a number
17 that is, you know, practically -- a practical calculation of
18 net revenues for those period of years from 2008 forward.

19 MR. PITTMAN: Correct.

20 THE COURT: And then I think that's it. I think the
21 way you should do this is both parties should send in a letter
22 by the 9th of August. And then if there's information that
23 your expert needs, Mr. Pittman, just make sure he puts it in
24 there, this is what I need. And if it was in accounting terms
25 so that folks can go through the books and pick out the

1 numbers real easy, that would be perfect.

2 MR. VOGL: All right.

3 MR. PITTMAN: And your Honor, in terms of the next
4 week, is the Court hearing any argument or anything, or is
5 that -- is that cancelled?

6 THE COURT: No, I think we'll cancel next week.
7 I'll get the letters on the 9th. We can have a conference
8 call that week if Mr. Pittman and Mr. Vogl can agree on the
9 time and date, we can probably set that up.

10 MR. VOGL: So you're saying after the letters are in
11 we can have a call, your Honor, that week --

12 THE COURT: Yes, you know, just to go over it.

13 MR. VOGL: Yeah. So sometime --

14 THE COURT: 10th, 11th or something like that.

15 MR. VOGL: Sure. It would be the Monday the 12th or
16 the 13th, somewhere in there.

17 THE COURT: Yeah, whatever it is, I don't know.

18 MR. VOGL: Yeah, got it. Okay.

19 THE COURT: All right. So do I need to issue an
20 order, or does everybody understand now?

21 MR. VOGL: This is Peter Vogl, I think you're clear,
22 your Honor. I understand what we're doing next.

23 MR. PITTMAN: Yes, your Honor, same here.

24 THE COURT: We'll agree that the 9th is the date for
25 receipt of the letters.

1 MR. VOGL: Yes.

2 THE COURT: Okay. All right. So thank you for

3 calling in. Thank you for your time.

4 (Counsel say thank you.)

5 (Matter concluded.)

6

7 - - -

8

9 "I certify that the foregoing is a correct transcript from the
10 record of proceedings in the above-entitled matter."

11

12 /S/ Francis J. Gable, C.C.R., C.R.R. 7/26/19

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Signature of Court Reporter

Date

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\$	3	A	
\$60 [1] - 7:17	3/28/13 [1] - 19:15	ability [2] - 16:15,	advertised [4] - 17:16,
/	3/28/2013 [1] - 17:16	38:15	18:10, 19:14, 19:17
/S [1] - 42:12	30th [3] - 37:2, 38:4,	able [13] - 12:25,	advertising [2] - 7:18,
0	38:9	16:17, 17:13, 20:18,	35:2
08608 [1] - 1:11	328 [1] - 15:17	24:24, 25:19, 25:20,	advice [1] - 27:20
1	374 [1] - 6:24	31:15, 31:16, 35:24,	aggregate [1] - 9:15
10 [1] - 30:5	379 [1] - 6:24	38:25, 39:23	agree [4] - 12:24,
10th [1] - 41:14		above-entitled [1] -	33:17, 41:8, 41:24
11th [1] - 41:14	4	42:10	ahead [4] - 27:23,
12 [1] - 7:15	4 [16] - 1:4, 3:3, 3:10,	absolutely [5] - 9:6,	28:6, 28:10, 39:18
12-year [1] - 4:10	4:12, 4:13, 4:21, 6:2,	11:1, 11:6, 18:3,	allegedly [1] - 17:6
123 [1] - 6:21	7:6, 9:15, 10:10,	27:22	alleging [1] - 17:24
12th [2] - 36:8, 41:15	19:14, 29:17, 31:4,	Absolutely [1] - 29:14	Allison [1] - 3:17
135 [1] - 6:22	31:8, 33:1, 37:14	accept [2] - 31:6,	ALLISON [1] - 2:10
13th [1] - 41:16	401 [2] - 4:24, 6:21	34:16	allow [6] - 13:23,
14-7770 [1] - 1:6	402 [1] - 1:11	accepting [2] - 12:23,	14:20, 16:10, 21:14,
1st [1] - 40:1	403 [1] - 5:11	22:21	21:22
2	49 [4] - 8:19, 8:21,	access [1] - 37:14	allowed [4] - 17:22,
20 [1] - 30:9	8:22, 21:9	accessing [1] - 36:11	19:9, 20:5, 26:22
2000 [2] - 14:9, 17:24	5	accomplish [1] -	allowing [1] - 14:7
2003 [9] - 4:11, 7:4,	50 [4] - 7:17, 9:12,	35:19	allows [1] - 20:13
7:7, 14:9, 17:7, 18:6,	28:13, 40:16	account [2] - 23:12,	alone [3] - 8:7, 8:10,
18:7, 18:8, 21:6	6	23:13	22:25
2004 [1] - 18:9	6/28 [1] - 6:6	accountant [11] -	America [21] - 3:4,
2007 [2] - 18:1, 20:4	7	13:12, 13:18, 14:9,	3:21, 3:22, 4:7, 4:8,
2008 [14] - 17:19,	7/12 [1] - 6:10	14:21, 16:19, 25:19,	4:10, 4:19, 5:5, 6:13,
17:20, 18:2, 19:12,	7/26/19 [1] - 42:12	25:23, 37:12, 37:13,	7:4, 7:19, 7:21, 8:6,
20:4, 20:20, 31:5,	712 [1] - 6:12	37:14, 37:18	8:23, 19:9, 19:25,
31:7, 36:5, 38:6,	8	accounting [12] -	21:7, 25:5, 27:6,
40:1, 40:18	856 [1] - 1:25	10:22, 10:24, 11:11,	32:17, 39:20
2009 [1] - 20:4	872 [1] - 6:24	12:4, 12:8, 12:19,	AMERICA [1] - 1:6
2011 [3] - 17:17,	889-4761 [1] - 1:25	23:10, 23:18, 26:2,	amount [1] - 24:6
18:11, 18:16	9	26:9, 31:18, 40:24	amounts [2] - 24:2,
2012 [1] - 6:25	990s [8] - 11:13,	accurate [1] - 13:19	24:5
2013 [4] - 7:8, 7:9,	11:14, 11:18, 11:19,	acknowledge [1] -	analogized [1] - 7:1
17:24, 19:23	11:21, 11:24, 24:19	17:6	analyzed [1] - 7:1
2014 [2] - 17:6, 19:8	9th [9] - 38:10, 38:15,	Act [2] - 6:15, 7:1	answer [2] - 12:11,
2015 [2] - 4:13, 7:7	38:19, 39:9, 39:12,	act [8] - 17:10, 17:23,	15:4
2016 [2] - 24:6, 24:18	39:16, 40:22, 41:7,	18:6, 18:7, 18:11,	ANTWI [2] - 2:3, 3:6
2017 [1] - 29:16	41:24	18:24, 19:1, 19:24	Antwi [1] - 3:7
2018 [4] - 4:19, 9:3,		action [4] - 6:20, 7:25,	ANY [1] - 1:19
9:9, 29:16		18:8	apologize [4] - 12:7,
2019 [2] - 1:10, 18:25		actions [1] - 7:21	19:6, 28:9
24 [1] - 1:10		acts [2] - 17:7, 18:4	appear [1] - 9:9
28 [1] - 6:3		actual [23] - 22:3,	appearances [1] - 3:4
2nd [1] - 36:8		23:10, 23:22, 24:16,	application [1] - 4:2
		24:18, 25:2, 25:5,	applied [6] - 6:20,
		25:6, 25:14, 25:17,	17:8, 17:12, 23:25,
		25:19, 25:20, 26:20,	25:2
		29:3, 29:12, 29:17,	applies [2] - 7:25,
		29:18, 29:22, 30:14,	40:14
		30:16, 38:23, 39:5	apply [7] - 8:14, 8:22,
		added [1] - 11:18	11:9, 15:21, 18:13,
		additional [1] - 15:22	32:20, 40:16
		address [1] - 17:4	appoint [4] - 12:8,
		adjourn [1] - 16:22	23:17, 31:17, 37:12
		adversary [1] - 15:12	appointed [1] - 12:13
			appointing [1] - 12:3
			appreciate [1] - 35:4
			appropriate [6] - 12:1,
			13:7, 23:5, 23:9,
			26:15, 34:3
			area [1] - 22:8
			argue [3] - 5:12,
			13:25, 22:2
			argued [1] - 26:2
			arguing [3] - 17:15,
			23:5, 24:3
			argument [10] - 10:5,
			14:4, 17:4, 19:22,
			20:3, 20:7, 20:24,
			24:12, 41:4
			arguments [2] - 14:2,
			15:12
			assist [4] - 23:18,
			24:8, 24:13, 29:20
			assuming [2] - 18:14,
			32:19
			assumptions [1] -
			13:4
			AUBREY [1] - 2:13
			Aubrey [1] - 3:20
			August [5] - 36:8,
			37:1, 37:7, 38:10,
			40:22
			availability [1] - 38:14
			available [1] - 14:24
			avoid [1] - 36:9
			award [1] - 32:13
			awarding [1] - 32:8
			aware [1] - 18:12
			B
			bad [1] - 34:6
			barred [1] - 4:9
			barring [1] - 14:7
			bars [1] - 5:20
			base [1] - 27:6
			based [15] - 7:20, 8:3,
			10:15, 11:19, 12:20,
			25:11, 27:4, 27:5,
			27:7, 29:17, 29:18,
			32:8, 33:2, 34:8,
			39:5
			basis [4] - 6:19, 8:21,
			11:3, 15:16
			became [1] - 18:12
			began [1] - 9:23
			begin [2] - 4:4, 39:25
			behalf [1] - 3:10
			benchmark [1] - 11:25
			benefit [1] - 16:13
			best [2] - 20:6, 38:6
			better [3] - 10:17,
			38:20, 40:6
			between [2] - 7:7, 7:17
			beyond [3] - 18:17,
			19:17, 22:17

bit [4] - 5:13, 14:18, 28:5, 33:23
books [1] - 40:25
bore [1] - 13:1
brand [1] - 7:19
break [3] - 9:16, 11:20, 28:17
brief [7] - 6:4, 6:5, 6:8, 6:11, 6:12, 6:14, 17:15
briefs [2] - 6:9, 22:20
bring [2] - 7:25, 17:13
bringing [2] - 6:20, 7:22
broad [1] - 39:13
broader [1] - 40:14
brought [6] - 4:13, 7:8, 7:11, 7:12, 17:6
Bryce [1] - 4:20
build [1] - 7:16
building [1] - 7:18
burden [1] - 25:8
business [1] - 22:17
BY [6] - 2:1, 2:3, 2:6, 2:9, 2:13, 2:15

C

C.C.R [2] - 1:24, 42:12
C.R.R [1] - 42:12
Caiafa [1] - 6:23
CAIAFA [1] - 6:23
calculate [1] - 35:18
calculated [1] - 18:2
calculation [15] - 27:1, 29:3, 29:4, 31:7, 31:12, 31:18, 32:24, 33:1, 34:7, 37:16, 38:11, 38:23, 39:10, 39:25, 40:17
calculations [2] - 26:22, 39:5
calendar [1] - 37:1
CAN [1] - 1:6
Can!s [7] - 4:7, 4:8, 4:10, 4:19, 7:5, 21:7, 27:6
cancel [1] - 41:6
cancelled [1] - 41:5
capture [1] - 18:20
Cars [7] - 3:4, 3:21, 3:23, 10:6, 17:16, 18:12, 32:17
cars [3] - 24:25, 29:7, 29:11
carve [1] - 5:2
case [31] - 4:14, 4:15, 4:24, 5:1, 6:1, 6:21, 6:24, 7:11, 7:12, 8:4,

8:9, 8:12, 8:16, 8:17, 8:24, 9:4, 12:14, 15:14, 16:10, 17:11, 17:12, 19:7, 20:22, 22:4, 22:5, 22:10, 22:14, 22:16, 22:18, 27:15, 27:22
cases [2] - 22:4, 22:15
categories [6] - 24:2, 24:3, 24:4, 24:5, 25:24, 26:6
category [2] - 40:8, 40:9
caused [3] - 7:22, 8:5, 19:25
cease [1] - 17:24
certain [3] - 22:8, 24:3, 26:5
certainly [13] - 5:17, 12:16, 13:4, 13:6, 15:22, 17:4, 23:3, 23:17, 23:19, 28:6, 30:9, 32:3
certainty [1] - 15:7
certify [1] - 42:9
chance [2] - 13:3, 39:8
change [2] - 26:21, 29:16
charitable [1] - 11:15
checked [1] - 10:4
Chicago [2] - 20:4, 20:9
CHRISTOPHER [1] - 2:10
Christopher [1] - 3:16
Circuit [2] - 8:9, 15:15
cited [1] - 22:4
citing [1] - 22:10
city [1] - 18:5
CIVIL [1] - 1:5
claim [4] - 4:13, 5:20, 17:6, 22:2
claims [3] - 4:9, 6:25, 17:12
CLARKSON [1] - 1:10
clear [2] - 5:15, 41:21
clearly [3] - 17:11, 18:13, 28:17
client [9] - 4:12, 6:2, 7:5, 7:22, 8:5, 14:23, 15:23, 36:11, 36:16
client's [2] - 7:6
clients [1] - 7:16
close [2] - 31:3, 32:4
closer [1] - 32:9
closing [1] - 20:3
co [2] - 3:8, 3:18
co-counsel [2] - 3:8, 3:18
coexisting [1] - 8:20

coming [1] - 16:16
commenting [1] - 28:6
common [1] - 21:17
compare [1] - 9:3
completely [3] - 8:16, 17:5, 23:4
complicated [2] - 26:18, 26:19
conclude [1] - 7:9
concluded [1] - 42:5
conference [1] - 41:7
confirm [1] - 14:19
conflict [1] - 36:10
CONFOY [1] - 2:9
Confoy [1] - 3:17
confused [1] - 17:14
considered [1] - 20:8
consist [1] - 26:13
continue [1] - 8:23
continued [2] - 6:13, 7:16
Cook [47] - 4:20, 4:23, 5:15, 8:14, 9:13, 9:14, 9:16, 11:21, 12:18, 13:5, 18:2, 19:12, 23:12, 23:21, 23:25, 24:4, 24:7, 24:8, 24:9, 24:10, 24:13, 24:16, 24:23, 25:2, 25:4, 25:5, 25:7, 25:11, 25:12, 25:15, 25:24, 26:6, 26:21, 27:2, 27:17, 27:25, 29:15, 29:16, 29:20, 29:21, 30:5, 30:23, 32:1, 32:11, 32:23, 36:2
Cook's [7] - 9:3, 9:7, 10:9, 16:8, 16:13, 16:21, 40:15
Correct [6] - 12:21, 28:24, 31:10, 40:3, 40:10, 40:19
correct [5] - 10:14, 11:2, 11:6, 17:7, 42:9
costs [2] - 7:18, 12:1
Counsel [2] - 3:2, 42:4
counsel [2] - 3:8, 3:18
counterclaim [1] - 19:9
country [2] - 33:21, 35:15
couple [5] - 9:20, 16:7, 20:22, 25:8, 32:18
course [2] - 17:4, 26:1
Court [53] - 4:17, 4:19, 5:4, 6:1, 6:4, 6:5, 8:13, 15:15, 16:13,

19:19, 19:20, 19:21, 20:13, 20:15, 20:16, 20:25, 21:8, 21:13, 21:21, 22:2, 22:9, 23:5, 23:6, 23:7, 23:11, 23:17, 23:18, 23:19, 24:8, 24:11, 24:13, 24:15, 25:17, 25:18, 25:19, 25:22, 26:3, 26:4, 26:7, 26:10, 26:11, 26:14, 29:21, 32:19, 38:25, 39:2, 39:4, 41:4, 42:15
COURT [94] - 1:1, 1:15, 3:1, 3:3, 3:12, 3:15, 3:19, 3:24, 4:5, 9:18, 9:20, 9:22, 10:3, 10:8, 10:13, 10:20, 11:10, 11:16, 12:3, 12:6, 12:8, 12:18, 12:22, 13:10, 13:25, 14:4, 14:22, 15:2, 15:11, 15:25, 16:3, 16:25, 17:2, 17:14, 17:20, 18:15, 19:2, 19:5, 19:7, 19:13, 20:6, 22:19, 22:23, 23:2, 27:9, 28:8, 28:10, 28:20, 28:25, 29:2, 29:6, 29:11, 30:22, 31:2, 31:11, 31:21, 31:24, 32:4, 32:11, 32:15, 32:22, 33:5, 33:13, 33:24, 34:2, 34:18, 34:22, 35:1, 35:6, 35:8, 35:14, 36:1, 36:13, 36:20, 37:3, 37:7, 37:9, 38:2, 38:18, 39:6, 39:13, 39:17, 39:24, 40:4, 40:11, 40:13, 40:20, 41:6, 41:12, 41:14, 41:17, 41:19, 41:24, 42:2
court [3] - 22:6, 22:12, 22:16
Court's [2] - 16:10, 32:20
COURTHOUSE [1] - 1:10
courts [4] - 6:17, 6:18, 6:25, 8:17
Covertch [1] - 22:5
craft [1] - 38:19
creates [1] - 9:2
cross [2] - 27:18, 27:19
cross-examination [2]

- 27:18, 27:19

D

Dallas [1] - 18:10
damages [31] - 4:7, 4:21, 5:8, 5:9, 5:16, 6:14, 8:8, 8:11, 8:15, 8:21, 9:23, 9:25, 13:7, 15:20, 15:21, 17:15, 17:18, 17:23, 18:2, 18:16, 18:17, 19:10, 20:6, 20:10, 20:14, 20:20, 22:7, 22:23, 31:3, 32:8, 32:12
DAMAGES [1] - 1:20
Date [1] - 42:15
date [6] - 16:23, 31:6, 33:16, 36:25, 41:9, 41:24
DAVID [1] - 2:6
David [1] - 3:10
dealing [3] - 16:21, 19:16, 34:22
deals [1] - 6:22
decide [1] - 24:8
decided [5] - 9:24, 11:4, 20:24, 24:12, 29:21
decides [1] - 23:5
decipherable [1] - 29:24
decision [7] - 14:12, 16:1, 26:8, 34:15, 34:19, 35:3, 39:25
deduct [2] - 26:8, 26:15
deducted [10] - 12:1, 24:4, 25:25, 26:6, 26:7, 26:12, 33:7, 40:7, 40:8
deductions [1] - 39:11
DEFENDANT [4] - 1:7, 2:11, 2:13, 2:16
defendants [1] - 3:15
delay [5] - 4:10, 5:21, 5:22, 8:4, 8:5
delayed [1] - 7:21
delivered [1] - 6:3
demonstrate [1] - 20:15
deposition [2] - 16:8, 16:11
depositions [1] - 37:25
describes [1] - 27:22
describing [1] - 27:11
desist [1] - 17:25

detail [6] - 5:13, 14:20, 15:9, 27:13, 28:1, 28:6
details [1] - 13:2
determination [1] - 26:14
determine [4] - 6:19, 13:12, 24:24, 31:16
determined [2] - 29:17, 29:18
determining [2] - 14:12, 26:16
differ [1] - 37:25
different [4] - 27:3, 33:6, 37:15, 38:22
digest [1] - 38:16
disagree [2] - 24:5, 40:9
disagreement [5] - 23:22, 23:23, 23:24, 24:1, 33:8
disclosing [1] - 5:7
discovery [1] - 27:8
discretion [1] - 24:9
discuss [1] - 11:25
discussing [1] - 15:19
discussion [3] - 8:11, 9:6, 13:6
disgorgement [7] - 10:6, 11:2, 11:4, 11:6, 11:9, 32:24, 34:3
dispute [1] - 40:7
distinct [1] - 18:4
distributed [1] - 14:17
District [1] - 6:24
DISTRICT [4] - 1:1, 1:1, 1:15, 1:15
divide [5] - 29:19, 30:2, 30:10, 30:15, 30:17
divided [2] - 24:25, 29:7
dividing [2] - 9:11, 26:25
doctrine [1] - 5:19
document [1] - 39:14
documents [1] - 9:14
dollar [1] - 11:19
domain [1] - 17:17
donated [1] - 14:17
donation [1] - 28:22
donations [7] - 26:25, 28:11, 28:13, 28:18, 28:20, 29:18, 29:22
done [12] - 6:17, 6:18, 11:13, 11:17, 12:12, 13:9, 16:17, 26:2, 27:1, 27:11, 29:20, 32:2

down [5] - 9:16, 11:20, 13:3, 15:19, 33:25
due [1] - 6:6
during [4] - 26:1, 27:8, 36:21, 37:7

E

easily [2] - 25:10, 38:3
EAST [1] - 1:11
easy [2] - 37:16, 41:1
effectively [1] - 24:21
effort [1] - 22:17
either [2] - 17:12, 26:8
Eleonore [1] - 3:7
ELEONORE [1] - 2:3
elicited [1] - 8:4
end [5] - 18:1, 38:23, 38:25, 39:4, 39:23
enter [1] - 3:4
entirety [1] - 4:8
entitled [7] - 13:22, 20:6, 20:17, 21:23, 22:7, 22:24, 42:10
equals [1] - 34:5
equitable [6] - 10:8, 10:23, 11:3, 11:7, 19:20, 22:2
equity [3] - 13:23, 23:4, 23:7
ESQUIRE [8] - 2:3, 2:6, 2:6, 2:9, 2:10, 2:10, 2:13, 2:15
estimate [1] - 29:2
estimated [1] - 29:6
estimates [5] - 9:4, 12:20, 12:23, 13:16, 34:8
evaluating [1] - 31:19
evidence [3] - 14:19, 18:9, 26:12
exact [2] - 32:24, 33:8
exactly [5] - 13:18, 14:7, 29:15, 32:22
examination [2] - 27:18, 27:19
exceeded [1] - 7:24
except [1] - 20:8
excessive [1] - 10:17
EXCLUDE [1] - 1:19
exclude [1] - 4:19
excluded [1] - 4:7
excuse [1] - 14:17
exercise [1] - 26:9
exists [1] - 15:7
expecting [1] - 36:15
expenditures [3] - 13:13, 13:14, 40:7
expense [1] - 26:16

expenses [30] - 10:14, 10:18, 12:9, 14:10, 23:11, 23:13, 23:24, 23:25, 24:1, 24:2, 24:3, 25:10, 25:20, 25:24, 26:6, 26:11, 26:13, 28:21, 29:12, 30:1, 30:2, 30:3, 31:7, 33:7, 34:5, 35:1, 40:8
experience [1] - 35:19
expert [26] - 4:19, 4:20, 12:15, 13:2, 14:24, 23:18, 27:20, 28:16, 30:8, 30:13, 30:14, 33:2, 35:15, 35:22, 36:2, 36:15, 37:19, 37:20, 38:14, 39:3, 39:8, 40:23
expert's [2] - 35:25, 38:25
experts [7] - 26:3, 26:5, 26:23, 31:17, 34:6, 37:17, 37:25
extent [4] - 4:20, 20:18, 39:20, 39:21
extraordinarily [1] - 10:16

F

F.3d [1] - 6:21
F.Supp.2d [1] - 6:24
fact [8] - 6:13, 7:13, 8:8, 8:20, 9:7, 12:24, 22:15, 26:12
facts [6] - 8:3, 8:17, 19:20, 22:3, 22:9, 22:14
fails [1] - 24:15
FALANGA [1] - 2:3
far [3] - 17:18, 20:10, 28:2
federal [2] - 21:1, 21:10
figure [3] - 35:16, 37:15, 38:6
file [3] - 18:22, 18:25
filed [5] - 6:9, 6:11, 19:9, 25:13
final [1] - 39:9
firm [2] - 12:4, 12:9
FIRM [1] - 2:12
First [1] - 9:22
first [8] - 4:12, 5:6, 7:10, 14:1, 18:6, 31:25, 33:20, 36:1
FISHER [1] - 1:10
fit [1] - 8:16

folks [5] - 6:13, 7:5, 31:19, 36:9, 40:25
follow [1] - 39:17
Footwear [3] - 22:4, 22:10, 22:16
FOR [5] - 2:4, 2:7, 2:11, 2:13, 2:16
foregoing [1] - 42:9
forget [1] - 30:23
form [1] - 11:24
formula [6] - 37:13, 37:18, 37:22, 38:4, 40:5, 40:6
forth [2] - 27:18, 28:22
forward [8] - 13:1, 15:18, 15:24, 19:12, 33:25, 34:17, 38:7, 40:18
founded [1] - 5:17
Fox [1] - 3:17
FOX [1] - 2:9
Francis [1] - 42:12
FRANCIS [1] - 1:24
frankly [5] - 5:16, 9:13, 16:15, 27:19, 27:24
fraud [2] - 6:19, 7:2
fruit [2] - 21:5, 21:14
full [1] - 15:6

G

Gable [1] - 42:12
GABLE [1] - 1:24
general [1] - 39:13
generally [1] - 40:13
generated [1] - 10:10
geographical [1] - 22:8
given [1] - 37:14
glad [1] - 33:15
gleaned [1] - 12:2
granular [1] - 14:15
granularity [1] - 14:16
greater [1] - 28:6
guess [10] - 13:20, 14:18, 15:13, 16:5, 16:18, 31:4, 34:11, 35:20, 36:24, 37:24
guilty [1] - 17:8

H

Hall [17] - 12:14, 23:21, 23:25, 24:3, 24:16, 24:24, 25:25, 26:5, 28:15, 30:5, 30:6, 30:25, 31:1,

31:2, 33:6, 35:14, 36:25
Hall's [1] - 33:20
hands [3] - 7:14, 28:5
happy [1] - 17:4
harm [1] - 8:5
hear [3] - 15:12, 26:3, 26:4
heard [1] - 19:13
HEARING [1] - 1:19
hearing [1] - 41:4
help [2] - 20:9, 35:16
helpful [2] - 14:12, 34:5
HERRINGTON [1] - 2:5
high [1] - 34:5
historical [1] - 27:5
hold [1] - 6:13
holiday [1] - 37:4
holidays [2] - 36:8, 36:21
HOLLOWS [1] - 2:10
Hollows [1] - 3:17
Honor [136] - 3:6, 3:9, 3:14, 3:16, 3:20, 4:3, 4:6, 4:11, 4:14, 4:17, 4:22, 5:4, 5:5, 5:8, 5:12, 5:13, 5:14, 5:19, 5:20, 5:22, 5:24, 6:3, 6:15, 6:18, 7:3, 7:20, 7:23, 8:3, 8:7, 8:10, 11:1, 11:2, 11:5, 11:12, 11:13, 12:5, 12:11, 12:16, 12:24, 13:20, 13:21, 14:15, 14:19, 15:5, 15:6, 15:9, 15:13, 15:21, 15:22, 16:5, 16:7, 16:15, 16:18, 16:22, 16:24, 17:3, 17:19, 18:3, 18:14, 18:18, 19:4, 19:18, 20:11, 20:21, 21:5, 21:16, 22:1, 22:5, 22:22, 23:4, 23:13, 23:16, 23:21, 24:11, 24:20, 25:4, 25:14, 26:1, 27:10, 27:19, 27:24, 28:7, 28:9, 28:11, 28:24, 29:1, 29:10, 29:14, 30:1, 30:4, 30:21, 31:1, 31:20, 31:22, 31:23, 32:1, 32:16, 33:4, 33:11, 33:18, 34:11, 34:12, 34:13, 34:14, 34:16, 34:25, 35:5, 35:20, 36:6, 36:10, 36:17, 36:18, 36:23,

36:24, 37:2, 37:8, 38:8, 38:9, 38:10, 38:17, 38:21, 39:5, 39:7, 39:10, 39:11, 39:15, 39:21, 41:3, 41:11, 41:22, 41:23	32:20, 33:11, 35:11, 35:22, 35:25, 36:3, 37:20, 37:23, 38:5, 38:11, 38:16, 38:17, 38:24, 39:9, 39:20, 39:22, 40:22	K	last [13] - 5:5, 5:25, 19:15, 25:7, 25:12, 27:4, 28:3, 32:2, 32:7, 32:18, 34:11, 34:12, 35:12	M
Honor's [3] - 11:5, 15:8, 38:11	infringe [1] - 8:19	K's [1] - 29:17	lateness [1] - 5:8	mark [2] - 4:13, 7:16
HONORABLE [1] - 1:14	infringed [2] - 6:3, 22:7	K4K [12] - 24:19, 25:3, 25:8, 25:10, 25:20, 26:20, 27:6, 30:10, 30:12, 32:19, 39:3, 39:19	latest [1] - 27:3	marketing [1] - 7:18
hour [1] - 35:23	infringement [15] - 4:14, 4:25, 8:18, 18:4, 18:5, 18:21, 19:10, 19:23, 20:1, 20:17, 20:18, 21:4, 21:6, 22:13	K4K's [3] - 25:3, 27:7, 29:18	law [4] - 15:14, 21:10, 21:17, 23:7	mathematical [1] - 27:1
Houston [3] - 17:16, 19:15, 19:24	infringing [1] - 21:7	K4L [1] - 25:21	LAW [2] - 2:12, 2:15	matter [7] - 7:13, 8:8, 9:11, 25:22, 26:10, 26:24, 42:10
hundred [1] - 15:6	injunction [3] - 5:16, 8:12, 8:22	KAREN [1] - 2:9	lawsuit [7] - 17:8, 17:13, 18:22, 18:25, 19:1, 19:8	Matter [1] - 42:5
hypothetical [4] - 14:6, 25:15, 25:16, 34:23	injunctive [1] - 4:9	Karen [1] - 3:17	least [2] - 11:24, 24:17	mean [3] - 12:16, 15:2, 38:13
hypotheticals [1] - 19:3	injury [1] - 8:5	KARS [1] - 1:4	legal [4] - 14:2, 14:4, 19:22	meantime [1] - 7:14
I	inquire [1] - 15:10	Kars [25] - 3:3, 3:10, 4:12, 4:13, 4:21, 6:2, 7:6, 9:15, 10:10, 17:17, 19:14, 20:3, 20:23, 20:25, 21:8, 21:12, 21:13, 21:18, 21:20, 22:10, 29:17, 31:4, 31:8, 33:1, 37:14	letting [1] - 23:6	meet [1] - 31:15
idea [2] - 13:22, 37:11	instance [3] - 18:10, 18:25, 26:16	Kaufhold [1] - 6:23	less [1] - 34:5	memory [1] - 11:5
identify [2] - 5:2, 6:16	instances [1] - 5:22	KAUFHOLD [1] - 6:23	letter [8] - 4:11, 7:4, 7:8, 7:9, 17:25, 19:23, 33:17, 40:21	mention [2] - 6:6, 6:10
imagine [1] - 15:8	insufficient [1] - 32:15	KAUFMAN [1] - 2:6	letters [4] - 38:19, 41:7, 41:10, 41:25	mentioned [1] - 7:4
immediately [2] - 15:10, 33:22	interested [1] - 33:24	Kaufman [2] - 3:10, 3:12	level [3] - 14:16, 14:20, 15:9	methodologies [3] - 13:5, 16:4, 27:25
impact [2] - 14:11, 16:14	Interestingly [1] - 5:24	keep [3] - 21:14, 21:15, 21:22	light [1] - 5:8	methodology [5] - 9:17, 26:22, 27:12, 29:15, 33:6
impacts [1] - 14:4	introduce [2] - 3:8, 3:18	keeps [1] - 23:14	likely [1] - 15:5	million [2] - 7:17, 15:17
impossible [1] - 33:16	investigation [1] - 19:25	KIDS [1] - 1:4	LIMINE [1] - 1:19	mind [2] - 10:14, 37:11
IN [1] - 1:19	irrelevant [2] - 4:24, 8:16	Kids [15] - 3:3, 3:10, 3:21, 3:23, 4:12, 4:13, 6:2, 7:6, 9:15, 10:10, 19:14, 31:4, 31:8, 32:17, 33:1	limine [1] - 4:18	minutes [1] - 30:5
inapplicable [1] - 17:5	issue [10] - 7:11, 8:7, 11:4, 23:16, 33:8, 34:15, 34:23, 35:15, 37:21, 41:19	Kids' [2] - 4:21, 37:14	limit [4] - 23:2, 24:9, 24:12, 29:21	missing [1] - 35:24
inappropriate [1] - 8:24	issues [1] - 35:6	Kinkade [1] - 3:17	limitation [1] - 36:11	Monday [2] - 5:5, 41:15
INC [1] - 1:4	J	KINKADE [2] - 2:10, 3:16	limitations [6] - 6:16, 6:20, 7:16, 7:24, 18:20, 18:23	monetary [1] - 4:9
include [1] - 19:10	January [2] - 36:5, 40:1	knows [5] - 5:20, 19:19, 20:25, 22:1, 36:17	limited [1] - 24:13	monkey [1] - 16:6
income [6] - 10:9, 10:15, 12:9, 13:13, 14:10, 34:5	JERSEY [3] - 1:1, 1:11, 1:15	L	limits [1] - 20:13	morning [7] - 3:2, 3:6, 3:9, 3:12, 3:16, 3:19, 3:24
incorrect [1] - 23:11	Jersey [6] - 6:17, 6:18, 6:24, 7:12, 20:5, 22:18	Laches [1] - 17:11	line [1] - 3:11	motion [1] - 4:18
incur [1] - 7:17	Jersey's [1] - 7:1	laches [20] - 4:10, 4:14, 5:18, 5:20, 8:1, 8:6, 8:7, 8:10, 8:13, 14:5, 14:11, 15:16, 17:4, 17:7, 18:13, 34:13, 34:15, 34:18, 34:19, 35:3	listen [1] - 33:15	MOTION [1] - 1:19
incurred [1] - 25:21	Jewish [2] - 36:7, 36:8	lack [1] - 10:16	listening [1] - 31:19	move [4] - 15:23, 16:23, 33:25, 36:17
Indeed [2] - 6:13, 9:13	JUDGE [1] - 1:15	Lanham [2] - 6:15, 6:25	litigation [1] - 7:9	MS [2] - 3:6, 3:22
indeed [10] - 4:25, 5:22, 6:11, 7:7, 7:22, 9:1, 9:2, 11:6, 11:7, 15:15	Judge [1] - 3:1		litigation [1] - 7:9	multiple [1] - 23:13
independent [3] - 12:17, 16:19, 25:18	JULY [1] - 1:10		LITTERINE [1] - 2:6	multiplied [1] - 29:23
indicated [1] - 10:20	jury [14] - 4:25, 6:2, 8:17, 11:5, 11:8, 20:24, 21:3, 21:9, 21:11, 21:16, 21:19, 21:23, 21:25, 22:24		Litterine [1] - 3:10	multiply [1] - 30:20
indication [1] - 6:12	jury's [2] - 8:25		LITTERINE- KAUFMAN [1] - 2:6	N
individual [1] - 9:7			Litterine-Kaufman [1] - 3:10	name [1] - 17:18
inexcusable [2] - 5:21, 5:22			LLP [3] - 2:3, 2:5, 2:9	narrow [1] - 18:5
inexcusably [1] - 7:21			look [16] - 11:18, 12:9, 13:10, 13:12, 13:13, 14:25, 16:19, 19:20, 20:22, 22:6, 22:9, 23:20, 30:13, 30:18, 35:18	national [12] - 6:14, 7:17, 12:2, 15:17, 20:25, 21:18, 21:19, 21:20, 21:22, 21:24, 30:17
information [24] - 14:24, 15:23, 16:20, 27:5, 27:7, 30:6,			looked [3] - 28:15, 28:16	nationally [4] - 10:10, 21:9, 21:11, 21:13
			looking [6] - 4:1, 26:20, 35:21, 37:1, 37:17, 38:11	nationwide [14] - 4:21, 4:23, 8:15, 8:23, 9:5, 9:11, 9:15, 11:21,
			looks [1] - 26:15	

11:24, 21:2, 21:4,
22:12, 27:11
Natural [3] - 22:4,
22:10, 22:16
nature [2] - 32:7, 35:3
need [31] - 4:15, 8:11,
10:21, 13:16, 16:8,
16:22, 31:2, 31:17,
32:6, 32:23, 32:25,
33:9, 33:20, 34:2,
34:6, 35:11, 35:25,
36:21, 37:9, 37:15,
37:18, 37:19, 37:20,
38:5, 38:25, 39:3,
39:19, 39:23, 40:16,
40:24, 41:19
needed [4] - 9:16,
10:17, 27:20, 37:23
needs [7] - 14:22,
28:2, 32:5, 36:2,
36:3, 40:23
net [9] - 26:16, 31:9,
32:25, 33:6, 34:4,
34:5, 36:4, 38:6,
40:18
never [4] - 7:10, 10:13,
17:11, 17:12
New [7] - 6:17, 6:18,
6:24, 7:1, 7:12, 20:5,
22:17
NEW [3] - 1:1, 1:11,
1:15
new [5] - 9:2, 9:8,
9:17, 9:25, 33:16
newest [1] - 5:25
next [16] - 4:15, 5:10,
10:1, 16:16, 18:15,
19:13, 19:16, 30:23,
31:15, 32:23, 33:3,
33:14, 35:9, 41:3,
41:6, 41:22
NICK [1] - 2:13
Nick [1] - 3:20
NO [1] - 1:5
none [2] - 13:9, 27:17
noon [1] - 39:2
nothing [3] - 7:6, 7:7,
7:19
notice [2] - 20:11,
20:13
nowhere [1] - 27:13
number [18] - 11:19,
13:15, 24:22, 24:25,
25:1, 26:24, 26:25,
29:7, 29:18, 30:3,
30:10, 30:15, 30:18,
32:8, 35:18, 36:4,
38:4, 40:16
numbers [13] - 12:19,
25:4, 25:5, 25:6,

32:6, 32:25, 33:2,
34:8, 34:9, 34:19,
37:25, 40:1, 41:1

O

O'Reilly [1] - 3:7
O'REILLY [1] - 2:3
object [1] - 23:19
objected [1] - 7:5
obtained [3] - 21:24,
25:3, 30:19
obviates [2] - 4:15,
8:11
obviously [11] - 12:13,
15:10, 15:20, 33:20,
34:13, 34:15, 34:16,
36:9, 36:14, 36:17,
38:13
Obviously [1] - 8:19
occurred [1] - 19:11
OF [2] - 1:1, 1:15
OFFICIAL [1] - 1:24
OFOU [2] - 2:3, 3:6
Ofosu [1] - 3:7
OFOU-ANTWI [2] -
2:3, 3:6
Ofosu-Antwi [1] - 3:7
omitting [1] - 20:23
ON [2] - 1:19, 1:20
once [1] - 18:8
one [7] - 8:18, 16:7,
18:5, 18:6, 20:12,
22:14, 36:6
One [2] - 10:3, 31:24
opening [3] - 6:4, 6:5,
20:2
opinion [5] - 4:7, 4:22,
4:23, 5:15, 5:16
OPINIONS [1] - 1:20
opinions [3] - 4:19,
4:20, 9:8
opportunity [2] - 28:4,
38:13
opposed [1] - 36:20
opposition [2] - 6:8,
6:11
order [10] - 31:13,
32:17, 32:19, 32:21,
33:1, 34:15, 37:21,
37:24, 38:20, 41:20
organizations [1] -
11:15
original [6] - 5:1,
11:23, 26:22, 27:14,
29:24, 40:15
originally [3] - 15:18,
27:12, 29:16
ORRICK [1] - 2:5

Orrick [1] - 3:8
outset [3] - 4:24, 7:4,
9:4
outside [1] - 22:7
overall [1] - 12:1
overbroad [1] - 10:16
overcome [3] - 8:2,
8:6
own [8] - 7:21, 12:17,
16:12, 16:14, 21:3,
21:4, 21:11, 21:12
owned [1] - 21:2

P

page [1] - 6:22
paper [3] - 25:17,
31:12, 35:17
part [1] - 23:6
particularly [1] - 6:17
parties [2] - 37:23,
40:21
party [4] - 30:12,
31:18, 37:21, 38:5
party's [3] - 17:12,
22:6, 31:11
PC [2] - 2:12, 2:15
penalty [1] - 13:24
pending [1] - 4:17
per [12] - 24:22, 25:1,
26:23, 29:2, 29:5,
29:8, 29:13, 29:23,
30:3, 30:17, 30:18,
30:20
percent [1] - 15:7
perfect [2] - 33:4, 41:1
perform [1] - 24:11
Perhaps [1] - 7:10
period [9] - 7:15,
17:22, 17:23, 18:3,
19:11, 32:9, 36:12,
38:16, 40:18
person [1] - 31:24
PETER [2] - 1:14, 2:6
Peter [7] - 3:9, 11:2,
33:10, 33:18, 34:12,
38:8, 41:21
PGS [1] - 1:6
phrase [1] - 11:14
pick [4] - 12:16, 19:21,
36:24, 40:25
piece [2] - 31:12,
35:17
Pitman [1] - 12:5
PITTMAN [43] - 2:12,
2:13, 3:20, 12:5,
12:7, 17:3, 17:19,
17:21, 18:18, 19:4,
19:6, 19:8, 19:18,
20:11, 22:22, 23:1,
23:3, 28:9, 28:11,
28:24, 29:1, 29:4,
29:10, 29:14, 31:1,
31:10, 31:20, 31:23,
32:1, 32:10, 32:14,
32:16, 33:4, 35:10,
35:20, 36:23, 38:21,
39:19, 40:3, 40:10,
40:19, 41:3, 41:23
Pittman [19] - 3:21,
10:6, 17:2, 17:14,
19:2, 22:19, 27:10,
27:21, 28:10, 28:23,
31:5, 31:24, 32:5,
32:22, 35:8, 37:3,
39:18, 40:23, 41:8
Pittman's [1] - 36:19
Pizzi [1] - 3:7
PIZZI [1] - 2:3
place [1] - 16:10
plaintiff [3] - 3:5, 3:10,
35:7
PLAINTIFF [3] - 1:4,
2:4, 2:7
plaintiff's [1] - 4:18
PLAINTIFF'S [1] -
1:19
point [14] - 4:24, 5:19,
8:15, 8:24, 13:4,
15:9, 19:21, 26:4,
27:21, 27:23, 32:22,
34:16, 36:6, 38:19
pointed [1] - 20:2
poisonous [2] - 21:5,
21:14
portion [1] - 11:4
position [2] - 10:25,
20:21
possible [1] - 36:18
practicable [2] - 31:3,
38:6
practical [2] - 36:4,
40:17
practically [1] - 40:17
precedent [1] - 8:9
precise [2] - 34:9,
40:5
preclude [1] - 34:13
precluded [1] - 5:18
precludes [1] - 8:7
prejudice [4] - 5:21,
5:23, 7:22, 7:23
prejudicial [1] - 5:11
prepare [1] - 35:11
prepared [7] - 16:15,
20:14, 22:2, 35:9,
35:10, 35:13, 39:22
Prepared [1] - 35:10
preparing [1] - 40:2

present [2] - 14:23,
36:10
presumption [8] -
7:25, 8:1, 21:2,
21:10, 21:11, 21:18,
21:19
pretty [1] - 40:6
previous [2] - 20:1,
25:11
previously [1] - 36:7
proceed [1] - 16:21
proceeding [1] - 9:25
proceedings [1] -
42:10
process [2] - 26:18,
33:25
produce [6] - 24:21,
25:9, 32:19, 33:2,
37:24
produced [3] - 10:9,
10:13, 27:3
producing [1] - 25:21
product [4] - 38:24,
39:1, 39:4, 39:23
profits [14] - 4:21,
4:23, 5:3, 9:5, 9:6,
9:8, 9:12, 31:9,
32:25, 33:7, 34:4,
34:5, 36:4, 38:6
program [1] - 26:11
projected [3] - 24:17,
32:7, 34:8
projection [1] - 25:12
projections [6] - 27:4,
27:5, 28:1, 32:9,
32:12, 35:12
promise [1] - 36:18
proof [2] - 18:17,
18:18
proper [1] - 23:4
properly [1] - 7:1
proposal [1] - 16:24
propose [1] - 13:21
proposed [3] - 5:16,
6:9, 16:9
proposing [1] - 13:5
propound [1] - 8:23
propounded [1] - 4:23
prove [1] - 21:24
provide [5] - 6:5,
15:15, 32:21, 33:11,
38:17
provided [7] - 5:6,
24:14, 27:7, 30:12,
30:13, 32:2, 35:22
provides [1] - 9:2
purposes [1] - 19:21
pursuant [1] - 8:9
pursuing [1] - 17:8
put [6] - 9:4, 9:25,

12:25, 15:18, 16:12,
26:12
puts [2] - 34:16, 40:23
putting [1] - 27:18

Q

questions [1] - 9:20
quickly [2] - 16:16,
36:18

R

raise [1] - 36:7
rather [1] - 37:18
reach [2] - 17:20, 36:9
read [1] - 22:20
reading [1] - 14:5
real [1] - 41:1
really [6] - 8:1, 10:16,
10:21, 26:9, 37:18,
38:14
reason [3] - 11:7,
19:18, 24:10
reasonable [2] - 36:4,
38:16
reasonably [1] - 31:3
reasoned [1] - 13:24
reasons [4] - 4:8,
5:13, 5:14, 10:3
rebuttal [2] - 12:13,
27:9
receipt [1] - 41:25
receive [1] - 19:10
received [2] - 25:20,
29:8
recite [1] - 4:20
recommendations [1]
- 37:12
record [7] - 14:19,
14:23, 22:3, 24:18,
28:12, 28:17, 42:10
records [15] - 13:11,
13:12, 13:18, 25:4,
25:9, 25:10, 25:11,
28:12, 28:22, 29:17,
29:19, 30:19, 37:14,
39:3, 39:5
recover [1] - 17:22
reduced [1] - 31:7
referring [1] - 18:6
regard [4] - 10:14,
28:22, 34:9, 35:17
registration [4] - 21:1,
21:10, 21:24
reiterate [1] - 15:14
rejected [2] - 21:12,
21:19

related [1] - 13:14
relates [1] - 26:21
relegated [1] - 5:1
relied [2] - 24:16,
32:12
relief [2] - 4:9
religious [2] - 36:21,
37:4
relying [1] - 39:21
remedies [6] - 4:15,
6:4, 6:5, 6:9, 8:9,
11:9
remedy [9] - 6:12,
10:9, 10:21, 10:23,
11:3, 11:7, 14:1,
19:20, 34:3
remind [1] - 6:1
render [1] - 34:19
rendered [1] - 11:8
report [40] - 5:1, 5:7,
5:9, 5:10, 5:25, 8:14,
9:1, 9:3, 9:4, 9:7,
9:9, 9:10, 9:17, 10:9,
10:15, 11:23, 12:14,
13:1, 15:17, 16:9,
16:11, 16:12, 16:13,
16:14, 16:21, 23:20,
25:13, 27:3, 27:14,
27:25, 28:1, 28:3,
29:24, 32:2, 32:15,
35:11, 36:15, 36:25,
39:9, 40:15
reported [2] - 30:10,
30:11
Reporter [1] - 42:15
REPORTER [1] - 1:24
reports [2] - 12:15,
23:20
represent [1] - 15:6
representing [1] -
38:14
reputation [1] - 7:17
request [1] - 11:3
requesting [1] - 4:18
require [1] - 37:23
resolves [1] - 8:10
respect [4] - 8:8, 9:1,
13:7, 19:1
respective [1] - 6:9
response [1] - 33:5
returns [1] - 11:14
revenue [21] - 9:5, 9:6,
9:15, 21:22, 23:22,
24:22, 24:25, 25:1,
25:21, 26:17, 26:23,
26:24, 27:12, 29:5,
29:8, 29:12, 29:23,
30:10, 30:18, 30:20
revenue-per-vehicle
[2] - 24:22, 25:1

revenue-per-week [1]
- 26:23
revenues [30] - 5:3,
9:8, 9:12, 11:18,
11:20, 11:21, 11:22,
12:2, 12:19, 24:16,
24:17, 24:18, 24:20,
24:21, 24:22, 24:23,
25:15, 25:16, 25:17,
25:19, 26:20, 29:2,
29:17, 30:14, 30:16,
30:17, 31:4, 40:18
rights [11] - 20:9, 21:2,
21:4, 21:7, 21:11,
21:13, 21:17, 21:18,
21:19, 21:22, 22:7
rocket [2] - 29:25,
30:8
rolling [1] - 33:22
ROTHSCHILD [1] -
2:9
Rothschild [1] - 3:17
roughly [1] - 18:1
Rule [1] - 5:11
run [1] - 35:2

S

Santana [1] - 6:21
sat [1] - 7:13
saw [1] - 19:14
science [2] - 29:25,
30:8
scope [1] - 8:12
seconds [1] - 28:18
see [11] - 13:14, 14:11,
20:10, 23:21, 28:21,
31:11, 34:19, 35:1,
35:2, 37:14, 40:15
seek [1] - 15:22
seeking [1] - 10:6
seeks [1] - 4:21
send [1] - 40:21
sense [3] - 31:15,
31:21, 35:10
sent [2] - 7:8, 17:24
serious [1] - 22:17
service [1] - 24:11
set [4] - 5:10, 28:22,
33:16, 41:9
Sheridan [1] - 3:1
SHERIDAN [1] - 1:14
show [5] - 20:18,
25:17, 25:19, 25:20,
29:4
showing [1] - 18:9
side [4] - 8:20, 11:12,
11:17, 37:20
sides [5] - 6:5, 6:9,
12:12, 12:15
Signature [1] - 42:15
simple [5] - 9:12, 9:13,
27:1, 27:15, 30:21
simplicity [1] - 27:21
sit [1] - 13:3
sitting [2] - 7:14, 15:5
six [10] - 6:18, 7:2,
17:22, 17:23, 17:25,
18:20, 18:21, 18:23,
19:11, 20:19
six-year [5] - 6:18, 7:2,
17:22, 17:23, 18:20
sometime [2] - 36:25,
41:13
somewhat [1] - 13:24
somewhere [1] -
41:16
sort [1] - 36:10
sought [1] - 15:17
sounds [1] - 38:21
source [1] - 30:12
speaking [1] - 20:12
speaks [1] - 8:15
specific [3] - 22:9,
22:15, 24:7
specifically [4] - 4:18,
6:16, 6:22, 14:18
standing [1] - 36:16
stands [1] - 16:9
start [3] - 3:5, 17:9,
31:5
started [4] - 20:25,
21:5, 21:6, 21:17
STATE [1] - 1:11
state [8] - 8:18, 9:7,
9:16, 11:20, 11:22,
22:14, 28:13
state-by-state [1] -
11:22
states [6] - 8:19, 8:21,
8:22, 21:9, 28:14,
40:16
STATES [1] - 1:1
statute [8] - 6:16,
6:19, 6:20, 7:2, 7:15,
7:24, 18:20, 18:23
still [4] - 10:25, 20:16,
20:19, 34:25
stopped [4] - 18:7,
18:8, 18:11
straightforward [1] -
13:17
STREET [1] - 1:11
stricken [1] - 15:18
study [1] - 27:11
stuff [1] - 13:19
subject [2] - 10:17,
27:18
submit [2] - 16:7,

36:25
submitted [4] - 8:14,
12:14, 12:15, 12:18
subtract [1] - 13:15
sued [1] - 7:10
sufficient [1] - 15:15
suggest [2] - 14:14,
27:15
suggesting [1] - 30:7
suit [2] - 7:8, 7:22
supplemental [9] -
5:6, 5:10, 5:25, 9:1,
9:9, 13:1, 16:9,
16:21, 36:15
suppose [3] - 10:10,
10:16, 37:10
SUTCLIFFE [1] - 2:5

T

tax [1] - 11:14
TELEPHONE [1] - 2:1
terms [9] - 5:2, 11:9,
13:24, 14:16, 23:22,
23:24, 28:5, 40:24,
41:3
test [2] - 12:25, 16:3
testimony [1] - 8:8
Texas [56] - 5:1, 5:2,
5:7, 6:3, 6:6, 6:10,
6:12, 7:6, 8:18, 9:8,
12:10, 12:19, 13:7,
13:8, 13:13, 13:14,
14:17, 15:20, 16:14,
18:16, 19:16, 20:8,
20:14, 20:17, 20:19,
20:20, 21:6, 22:24,
23:2, 24:7, 24:9,
25:3, 26:21, 27:13,
27:16, 27:17, 27:25,
28:11, 28:18, 29:11,
29:13, 29:21, 29:22,
30:4, 30:15, 30:19,
31:5, 31:13, 34:10,
35:2, 36:5, 40:14
themselves [2] - 3:8,
3:18
theory [15] - 4:21, 5:7,
6:7, 6:10, 6:14, 8:15,
8:23, 9:2, 9:3, 11:23,
11:24, 12:25, 15:18,
27:17, 31:14
they've [4] - 11:18,
22:4, 25:9
thinks [3] - 23:8,
26:11, 33:7
Third [2] - 8:9, 15:15
third [2] - 30:12, 31:18
third-party [2] - 30:12,

31:18
three [6] - 4:8, 5:12,
 5:14, 28:18, 32:7,
 35:12
throw [3] - 16:6,
 16:18, 16:23
tied [1] - 28:5
tight [1] - 33:23
timeframe [1] - 18:12
timely [1] - 5:17
timing [1] - 33:22
TO [1] - 1:19
today [4] - 18:19,
 18:25, 19:2, 36:9
together [2] - 13:11,
 35:16
tomorrow [2] - 33:21,
 39:2
took [5] - 24:22,
 24:24, 29:7, 29:22,
 30:4
topic [1] - 6:22
total [9] - 24:22,
 24:25, 26:24, 26:25,
 29:7, 30:2, 30:9
transcript [2] - 10:4,
 42:9
tree [2] - 21:5, 21:14
TRENTON [1] - 1:11
trial [7] - 4:15, 5:9,
 8:4, 9:23, 20:20,
 26:2
tried [1] - 24:11
trouble [1] - 12:23
true [1] - 20:15
truth [2] - 32:5
trying [2] - 16:3, 35:23
Tuesday [3] - 5:10,
 16:16, 16:23
turning [2] - 5:24,
 23:10
twice [1] - 7:15
two [10] - 9:24, 22:4,
 25:12, 25:23, 26:5,
 27:4, 31:17, 35:12,
 37:17, 38:18
type [3] - 10:22, 24:1,
 24:2

U

U.S [2] - 1:15, 1:24
unavailable [1] - 13:2
under [5] - 4:24, 5:11,
 6:25, 21:10, 22:24
Understood [3] - 15:1,
 34:11, 40:12
undertake [1] - 26:10
UNITED [1] - 1:1

unless [2] - 13:17,
 20:7
untimely [2] - 5:11,
 17:9
up [19] - 7:11, 9:16,
 11:18, 13:15, 16:16,
 24:6, 24:17, 25:5,
 25:16, 26:23, 29:8,
 30:16, 33:6, 33:13,
 33:16, 36:3, 38:6,
 39:23, 41:9
upcoming [1] - 5:9
uses [2] - 9:14
USPTO [1] - 21:25
utilize [1] - 40:5

V

VALERIE [1] - 2:15
Valerie [1] - 3:22
vehicle [13] - 24:22,
 25:1, 26:23, 27:12,
 29:3, 29:5, 29:8,
 29:13, 29:23, 30:3,
 30:17, 30:18, 30:20
vehicles [5] - 25:2,
 30:3, 30:10, 30:15,
 30:18
verdict [4] - 6:1, 8:25,
 11:8, 22:24
versus [1] - 3:3
vettied [1] - 28:2
view [2] - 5:9, 8:24
VOGL [54] - 2:6, 3:9,
 3:14, 4:3, 4:6, 9:19,
 9:21, 10:2, 10:7,
 10:12, 10:19, 11:1,
 11:12, 11:17, 12:11,
 12:21, 12:24, 13:20,
 14:3, 14:14, 15:1,
 15:4, 15:13, 16:2,
 16:5, 17:1, 27:10,
 30:25, 31:22, 33:10,
 33:18, 34:1, 34:11,
 34:21, 34:24, 35:4,
 35:7, 36:6, 36:14,
 36:24, 37:6, 37:8,
 38:1, 38:8, 39:7,
 39:15, 40:12, 41:2,
 41:10, 41:13, 41:15,
 41:18, 41:21, 42:1
Vogl [33] - 3:9, 3:12,
 4:1, 9:18, 11:2, 12:6,
 12:8, 14:22, 17:5,
 18:6, 18:14, 20:2,
 23:11, 23:14, 24:15,
 26:2, 26:19, 27:9,
 28:14, 30:7, 32:2,
 33:10, 33:19, 34:12,

35:9, 35:20, 35:21,
 35:24, 37:4, 38:8,
 38:22, 41:8, 41:21
Vogl's [1] - 30:24
Vs [1] - 1:5

W

waiting [1] - 36:16
Walsh [1] - 3:7
WALSH [1] - 2:3
wants [2] - 15:9, 23:8
warehouse [1] - 26:16
wash [1] - 21:16
Wednesday [2] - 5:25,
 28:3
week [16] - 4:16, 9:24,
 10:1, 26:23, 30:23,
 31:16, 32:3, 32:23,
 33:3, 33:15, 35:9,
 35:19, 41:4, 41:6,
 41:8, 41:11
whatsoever [2] - 6:10,
 21:4
WILDE [2] - 2:15, 3:22
Wilde [1] - 3:22
winner [1] - 22:17
witness [2] - 12:13,
 26:13
word [1] - 10:17
works [1] - 18:19
worth [1] - 7:18
wrench [1] - 16:6
write [2] - 35:17, 38:2
written [1] - 7:5

Y

Yanaros [1] - 3:22
YANAROS [2] - 2:15,
 2:15
year [14] - 6:18, 7:2,
 14:10, 14:11, 17:22,
 17:23, 18:20, 28:18,
 31:5, 34:20, 35:1,
 35:2, 40:2
years [15] - 7:15,
 17:25, 18:21, 18:23,
 19:11, 20:19, 25:8,
 25:11, 25:12, 27:4,
 30:9, 32:7, 32:18,
 35:12, 40:18